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Tuesday
August 30, 1988

Briefings on How To Use the Federal Register—
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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC

WHEN: September 13; at 9:00 a.m.
WHERE: Office of the Federal Register,
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1100 L Street NW., Washington, DC
RESERVATIONS: Doris Tucker, 202–523–3419

CHICAGO, IL

WHEN: September 19; at 9:15 a.m.
WHERE: Room 3320,
Federal Building,
230 S. Dearborn St.,
Chicago, IL
RESERVATIONS: Call the Federal Information Center,
Chicago 312–353–5692

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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 29

[AMS-TB-88-033RN]

Tobacco Inspection; Growers' Referendum Results

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This document contains the determination with respect to the referendum on the designation of the consolidated flue-cured tobacco markets of Carthage and Aberdeen, North Carolina. A mail referendum was conducted during the period of March 28–April 1, 1988, among tobacco growers who sell their tobacco at auction in Carthage and Aberdeen, North Carolina, to determine producer approval of the designation of these two markets as one consolidated market. Eligible producers voted in favor of the designation. Therefore, for the 1989 and succeeding flue-cured marketing seasons, the Carthage and Aberdeen, North Carolina, tobacco markets shall be designated as and be called Carthage-Aberdeen. The regulations are amended to reflect this new designated market.

EFFECTIVE DATE: September 29, 1988.

FOR FURTHER INFORMATION CONTACT: Director, Tobacco Division, Agricultural Marketing Service, United States Department of Agriculture, P.O. Box 96456, Room 502 Annex, Washington, DC 20090–6456, telephone (202) 447–2567.

SUPPLEMENTARY INFORMATION: A notice was published in the March 24, 1988, issue of the **Federal Register** (53 FR 9673) advising that a referendum would be conducted among flue-cured producers who market their tobacco on the Carthage and Aberdeen, North Carolina, markets to ascertain if such producers favored the designation of the consolidated market. Carthage and Aberdeen had been officially and separately designated on June 26, 1942 (7 CFR 4811) under the Tobacco Inspection Act of 1935 (7 U.S.C. 511 *et seq.*).

The referendum was conducted among producers who were engaged in the production of flue-cured tobacco which they marketed in Carthage and Aberdeen, North Carolina, during the calendar year 1987. Ballots for the March 28–April 1 referendum were mailed to 410 producers. Approval required votes in favor of the proposal by two-thirds of the eligible voters who cast valid ballots. The Department received a total of 113 responses: 101 eligible producers voted in favor of the consolidation of the Carthage and Aberdeen markets; 2 eligible producers voted against the consolidation; and 10 ballots were determined to be invalid because they were not completed and/or signed.

The notice of referendum announced the determination by the Secretary that the consolidated market of Carthage-Aberdeen, North Carolina, would be designated as a flue-cured tobacco auction market and receive mandatory, Federal grading of tobacco sold at auction for the 1988 and succeeding seasons, subject to the results of the referendum. That determination was based on the evidence and arguments presented at a public hearing held in Aberdeen, North Carolina, on October 28, 1987, pursuant to applicable provisions of the regulations issued under the Tobacco Inspection Act, as amended. The referendum was held in accordance with the provisions for referendum of the Tobacco Inspection Act, as amended (7 U.S.C. 511d) and the regulations set forth in 7 CFR 29.74.

This final rule has been reviewed under USDA procedures established to implement Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "nonmajor" rule because it does not meet any of the criteria established for major rules under the executive order.

Additionally, in conformance with the provisions of Pub. L. 96–354, the Regulatory Flexibility Act, full consideration has been given to the potential economic impact upon small business. Tobacco warehousemen and producers fall within the confines of "small business" as defined in the Regulatory Flexibility Act. A number of firms which are affected by these adopted regulations do not meet the definition of small business either because of their individual size or because of their dominant position in one or more marketing areas. The Administrator of the Agricultural Marketing Service has determined that this action will not have a significant impact on a substantial number of small entities, and will not substantially affect the normal movement in the marketplace.

List of Subjects in 7 CFR Part 29

Administrative practices and procedure, Tobacco.

For the reason set forth in the preamble, 7 CFR Part 29, Subpart D, is amended as follows:

PART 29—[AMENDED]

Subpart D—Order of Designation of Tobacco Markets

1. The authority citation for 7 CFR Part 29, Subpart D, continues to read as follows:

Authority: Sec. 5, 49 Stat. 732 as amended by sec. 157(a)(i), 95 Stat. 374 (7 U.S.C. 511d).

§ 29.8001 [Amended]

2. In § 29.8001, the table is amended by removing under item (t) in the column Auction Markets the words "Aberdeen, N.C. and "Carthage, N.C." and by adding a new entry (bbb) to read as follows:

Territory	Type of tobaccos	Auction markets	Order of designation	Citation
* * * * * * *				
(bbb) North Carolina	Flue-Cured	Carthage-Aberdeen	Aug. 30, 1988	53 FR.

Dated: August 22, 1988.

J. Patrick Boyle,

Administrator.

[FR Doc. 88–19636 Filed 8–29–88; 8:45 am]

BILLING CODE 3410-02-M

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 88–123]

Melon Fly; Removal of Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule.

SUMMARY: We are affirming without change an interim rule that removed the melon fly regulations that designated a portion of Los Angeles County in California as a quarantined area and imposed restrictions on the interstate movement of regulated articles from that area. We have determined that the melon fly has been eradicated from Los Angeles County, California, and the regulations are no longer necessary.

EFFECTIVE DATE: September 29, 1988.

FOR FURTHER INFORMATION CONTACT: Eddie Elder, Chief Operations Officer, Domestic and Emergency Operations Staff, PPQ, APHIS, USDA, room 661, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301–436–6365.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective May 16, 1988, and published in the **Federal Register** on May 19, 1988 (53 FR 17912–17913, Docket Number 88–064), we amended the "Domestic Quarantine Notices" in 7 CFR Part 301 by removing the melon fly regulations (7 CFR 301.97 through 301.97–10). These regulations designated a portion of Los Angeles County in California as a quarantined area and imposed restrictions on the interstate movement of regulated articles from that area. We have determined that the melon fly has been eradicated from Los Angeles County, California, and the regulations are no longer necessary. Comments on the interim rule were required to be postmarked or received on or before July 18, 1988. We did not receive any comments. The facts presented in the interim rule still provide a basis for the rule.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived the review process required by Executive Order 12291.

Within the part of Los Angeles County that was quarantined, there were fewer than 250 small entities affected, including 53 nurseries, 150 mobile fruit vendors, 30 fruit stands, 5 fruit wholesalers, and 8 companies catering to airlines. Most of the sales by the fruit vendors and the fruit stand operators are local intrastate, and were not affected by the quarantine. Effects on the nurseries were minimized by the availability of soil treatment under the regulations. Effects on the fruit wholesalers were minimized by the availability of treatments for many of the regulated articles. Effects on the caterers were negligible, because virtually all of their food products intended for interstate movement originate outside the quarantined area and, properly handled, can be moved onto aircraft without a certificate or limited permit.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The regulations in this subpart contain no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases, Plant pests, Plants (Agriculture), Quarantine, Transportation, Melon fly, Incorporation by reference.

PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR Part 301 and that was published at 53 FR 17912–17913 on May 19, 1988.

Authority: 7 U.S.C. 150bb, 150dd, 150ee, 150ff; 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

Done in Washington, DC, this 25th day of August, 1988.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 88–19706 Filed 8–29–88; 8:45 am]

BILLING CODE 3410-34-M

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7 CFR Part 301

[Docket No. 88–124]

Oriental Fruit Fly; Removal of Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule.

SUMMARY: We are affirming without change an interim rule that removed the Oriental fruit fly regulations that designated a portion of Orange County in California as a quarantined area and imposed restrictions on the interstate movement of regulated articles from that area. We have determined that the Oriental fruit fly has been eradicated from Orange County, California, and the regulations are no longer necessary.

EFFECTIVE DATE: September 29, 1988.

FOR FURTHER INFORMATION CONTACT: Eddie Elder, Chief Operations Officer, Domestic and Emergency Operations Staff, PPQ, APHIS, USDA, Room 661, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301–436–6365.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective May 16, 1988, and published in the **Federal Register** on May 19, 1988 (53 FR 17911–17912, Docket Number 88–077), we amended the "Domestic Quarantine Notices" in 7 CFR Part 301 by removing the Oriental fruit fly regulations (7 CFR

301.93 through 301.93–10). These regulations designated a portion of Orange County in California as a quarantined area and imposed restrictions on the interstate movement of regulated articles from that area. We have determined that the Oriental fruit fly has been eradicated from Orange County, California, and the regulations are no longer necessary. Comments on the interim rule were required to be postmarked or received on or before July 18, 1988. We did not receive any comments. The facts presented in the interim rule still provide a basis for the rule.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived the review process required by Executive Order 12291.

Within the part of Orange County that was quarantined, there are approximately 80 small entities that may have been affected. These include approximately 60 nurseries, 10 roadside stands and flea markets, 6 fruit and vegetable growers, 2 packing houses, 1 processor, and 1 farmers market. The vegetable growers have a total of 23 acres in production, including 3 acres of avocados, 10 acres of tomatoes, and 10 acres of peppers and cucumbers. The effect of this rule on these entities should be significant, since most of their sales are local intrastate and are not affected by the regulatory provisions we are removing. Those sales that are affected are mainly of articles that can be moved interstate after compliance with treatment or inspection provisions of the regulations. Compliance with these provisions does not add significant costs to the interstate movement of most of these affected articles.

Based on these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The regulations in this subpart contain no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires governmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases, Plant pests, Plants (Agriculture), Quarantine, Transportation, Oriental fruit fly, Incorporation by reference.

PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR Part 301 and that was published at 53 FR 17911–17912 on May 19, 1988.

Authority: 7 U.S.C. 150bb, 150dd, 150ee, 150ff; 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

Done at Washington, DC, this 25th day of August, 1988.

James W. Glosser,
Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 88–19705 Filed 8–29–88; 8:45 am]

BILLING CODE 3410-34-M

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7 CFR Part 301

[Docket No. 88–122]

Peach Fruit Fly; Removal of Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule.

SUMMARY: We are affirming without change an interim rule that removed the Peach fruit fly regulations that designated a portion of Los Angeles County in California as a quarantined area and imposed restrictions on the interstate movement of regulated articles from that area. We have determined that the peach fruit fly has been eradicated from Los Angeles County, California, and the regulations are no longer necessary.

EFFECTIVE DATE: September 29, 1988.

FOR FURTHER INFORMATION CONTACT: Eddie Elder, Chief Operations Officer, Domestic and Emergency Operations Staff, PPQ, APHIS, USDA, Room 661, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301–436–6365.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective May 16, 1988, and published in the **Federal Register** on May 19, 1988 (53 FR 17913–17914, Docket Number 88–025), we amended the "Domestic Quarantine Notices" in 7 CFR Part 301 by removing the "Peach Fruit Fly" regulations (7 CFR 301.96 through 301.96–10). These regulations designated a portion of Los Angeles County in California as a quarantined area and imposed restrictions on the interstate movement of regulated articles from that area. We have determined that the peach fruit fly has been eradicated from Los Angeles County, California, and the regulations are no longer necessary. Comments on the interim rule were required to be postmarked or received on or before July 18, 1988. We did not receive any comments. The facts presented in the interim rule still provide a basis for the rule.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information complied by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived the review process required by Executive Order 12291.

Within the quarantined area, there are fewer than 115 small entities that may be affected, including 45 nurseries, 50 mobile fruit vendors, eight fruit stands, and eight companies catering to airlines.

The effect of this rule on these entities should be insignificant. Most of the sales by the entities, except for the nurseries and caterers, are local, intrastate and were not affected by the regulatory provisions we removed. Effects on the nurseries were minimized by the availability of soil treatment under the regulations. Effects on the caterers were negligible, because virtually all of their food products intended for interstate movement originated outside the quarantined area and, properly handled, were permitted to be moved onto aircraft without a certificate or limited permit.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (see 7 CFR 3015, Subpart V.)

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases, Plant pests, Plants (Agriculture), Quarantine, Transportation, Peach fruit fly.

PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR Part 301 and that was published at 53 FR 17913–17914 on May 19, 1988.

Authority: 7 U.S.C. 150dd, 150ee, 150ff, 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

Done in Washington, DC, this 25th day of August, 1988.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 88–19704 Filed 8–29–88; 8:45 am]

BILLING CODE 3410-34-M

Agricultural Marketing Service

7 CFR Part 932 and Part 944

[Docket No. FV-88-119]

Olives Grown in California and Imported Olives; Interim Final Rule Establishing Grade and Size Requirements for Limited Use Styles of California Processed Olives for the 1988–89 Season, and Conforming Changes in the Olive Import Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule establishes grade and size requirements for California processed olives used in the production of limited use styles of olives such as wedges, halves, slices, or segments and establishes similar requirements in the olive import regulation to bring that regulation into conformity with the domestic requirements. The grade and size requirements are the same as implemented last season. Olives used in limited use styles are too small to be desirable for use as whole or pitted canned olives because their flesh-to-pit ratio is too low. However, they are satisfactory for use in the production of products where the form of the olive is changed. Their use in such products over the years has helped the California olive industry meet the increasing market needs of the food service industry. The requirements for domestic olives were recommended by the California Olive Committee, which works with the Department in administering the marketing order program for olives grown in California. The establishment of such requirements for imported olives is required pursuant to section 8e of the Agricultural Marketing Agreement Act of 1937.

DATES: Interim final rule is effective August 30, 1988. Comments which are received by September 29, 1988, will be considered prior to issuance of the final rule.

ADDRESS: Written comments concerning this rule should be submitted in triplicate to the Docket Clerk, F&V Division, AMS, USDA, P.O. Box 96456, Room 2085–S, Washington, DC 20090–6456. All comments submitted will be made available for public inspection in the above office during regular business hours. Comments should reference the date and page number of this issue of the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: George J. Kelhart, Marketing Order Administration Branch, F&V Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456; telephone 202–475–3919.

SUPPLEMENTARY INFORMATION: This interim final rule is issued under Marketing Order No. 932 [7 CFR Part 932], as amended (the order), regulating the handling of olives grown in California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act.

This rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are seven handlers of California olives subject to regulation under the order and approximately 1,400 producers in California. Approximately 25 importers of olives are subject to the olive import regulation. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.2] as those having annual gross revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. Most but not all of the olive producers and importers may be classified as small entities. None of the olive handlers may be classified as small entities.

Nearly all of the olives grown in the United States are produced in California. The growing areas are scattered throughout California with most of the commercial production coming from inland valleys. About 75 percent of the production comes from the San Joaquin Valley and 25 percent from the Sacramento Valley.

Olive production has fluctuated from a low of 24,200 tons in the 1972–73 crop year to a high of 146,500 tons in the

1982–83 crop year. Last year's production totaled about 64,000 tons. The various varieties of olives produced in California have alternate bearing tendencies with high production one year and low the next. The industry expects the 1988–89 crop to be about 85,000 tons.

The primary use of California olives is for canned ripe olives which are eaten out of hand as hors d'oeuvres or used as an ingredient in cooking. The canned ripe olive market is essentially a domestic market. Very few California olives are exported.

This action will allow handlers to market more olives than would be permitted in the absence of this relaxation in size requirements. This additional opportunity is provided to maximize the use of the California olive supply, facilitate market expansion, and benefit both growers and handlers.

This interim rule modifies § 932.153 of Subpart-Rules and Regulations [7 CFR 932.108 through 932.161]. The modification establishes grade and size regulations for 1988–89 crop limited use size olives. The modification is issued pursuant to paragraph (a)(3) of § 932.52 of the order. This rule also makes necessary conforming changes in the olive import regulation [Olive Regulation 1; 7 CFR 944.401]. The import regulation is issued pursuant to section 8e of the Act. Section 8e provides that whenever grade, size, quality, or maturity provisions are in effect for specified commodities, including olives, under a marketing order, the same or comparable requirements must be imposed on the imports.

Paragraph (a)(3) of § 932.52 of the marketing order provides that processed olives smaller than the sizes prescribed for whole and pitted styles may be used for limited uses if recommended by the committee and approved by the Secretary. The sizes are specified in terms of minimum weights for individual olives in various size categories. The section further provides for the establishment of size tolerances.

To allow handlers to take advantage of the strong market for halved, segmented, sliced, and chopped canned ripe olives, the committee recommended that grade and size requirements again be established for limited use olives for the 1988–89 crop year (August 1 through July 31). The grade requirements are the same as those applied during the 1987–88 crop year, as are the sizes and the size tolerances. Permitting handlers to use small olives in limited use style canned olives will have a positive impact on industry returns. In the absence of this action, the undersized fruit would have to be used for non-canning uses, like oil, for which returns are lower. Except for the changes necessary in the effective date, the provisions, hereinafter set forth in § 932.153, are the same as those established last season.

Paragraph (b)(12) of § 944.401 of the olive import regulation allows imported bulk olives which do not meet the minimum size requirements for canned whole and pitted ripe olives to be used for limited use styles if they meet specified size requirements. Continuation of the limited use authorization for California olives by this interim rule requires that similar changes be made in paragraph (b)(12) of § 944.401 to keep the import regulation in conformity with the applicable domestic requirements. These conforming changes will benefit importers because they will be able to import small-sized olives for limited use during the 1988–89 season ending July 31, 1989.

Based on the above, the Administrator of AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented, the information and recommendations submitted by the committee, and other available information, it is determined that the provisions as hereinafter set forth will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is found and determined that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) Compliance with this action will require no special preparation by handlers and importers; (2) it is important that these requirements apply to as much of the 1988–89 marketing season as possible; (3) the olive import requirements are mandatory under section 8e of the Act; (4) this action relieves restrictions on handlers and importers; and (5) the rule provides a 30-day comment period, and any comments received will be considered prior to the issuance of a final rule.

List of Subjects

7 CFR Part 932

Marketing agreements and orders, Olives, California.

7 CFR Part 944

Marketing agreements and orders, Fruits, Import Regulations.

For the reasons set forth in the preamble, 7 CFR Parts 932 and 944 are amended as follows.

1. The authority citations for 7 CFR Parts 932 and 944 continue to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

PART 932—OLIVES GROWN IN CALIFORNIA

2. Section 932.153 is revised to read as follows:

Note.—This section will appear in the Code of Federal Regulations.

§ 932.153 Establishment of grade and size requirements for processed 1988–89 crop year olives for limited use.

(a) *Grade.* On and after August 30, 1988, any handler may use processed olives of the respective variety group in the production of limited use styles of canned ripe olives if such olives were processed after July 31, 1988, and meet the grade requirements specified in paragraph (a)(1) of § 932.52 as modified by § 932.149.

(b) *Sizes.* On and after August 30, 1988, any handler may use processed olives in the production of limited use styles of canned ripe olives if such olives were harvested during the period August 1, 1988, through July 31, 1989, and meet the following requirements:

(1) The processed olives shall be identified and kept separate and apart from any olives harvested before August 1, 1988, or after July 31, 1989.

(2) Variety Group 1 olives, except the Ascolano, Barouni, or St. Agostino varieties, shall be of a size which individually weigh 1/90 pound: *Provided,* That no more than 35 percent of the olives in any lot or sublot may be smaller than 1/90 pound.

(3) Variety Group 1 olives of the Ascolano, Barouni, or St. Agostino varieties shall be of a size which individually weigh 1/140 pound: *Provided,* That no more than 35 percent of the olives in any lot or sublot may be smaller than 1/140 pound.

(4) Variety Group 2 olives, except the Obliza variety, shall be of a size which individually weigh 1/180 pound: *Provided,* That no more than 35 percent of the olives in any lot or sublot may be smaller than 1/180 pound.

(5) Variety Group 2 olives of the Obliza variety shall be of a size which individually weigh 1/140 pound: *Provided,* That no more than 35 percent of the olives in any lot or sublot may be smaller than 1/180 pound.

PART 944—FRUITS; IMPORT REGULATIONS

5. Section 944.401 is amended by revising the introductory text of paragraph (b)(12) to read as follows:

Note.—This paragraph will appear in the Code of Federal Regulations.

§ 944.401 Olive Regulation 1.

* * * * *

(b) * * *

(12) Imported bulk olives when used in the production of canned ripe olives must be inspected and certified as prescribed in this section. Imported bulk olives which do not meet the applicable minimum size requirements specified in paragraphs (b)(2) through (b)(11) of this section may be imported during the period August 30, 1988, through July 31, 1989, for limited use, but any such olives so used shall not be smaller than the following applicable minimum size:

* * * * *

Dated: August 24, 1988.

Charles R. Brader,

Director, Fruit and Vegetable Division.

[FR Doc. 88-19635 Filed 8-29-88; 8:45 am]

BILLING CODE 3410-02-M

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7 CFR Part 1126

[DA-88-114]

Milk in the Texas Marketing Area; Order Suspending Certain Provisions

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Suspension of rules.

SUMMARY: This action continues, for the months of August 1988 through July 1989, a suspension of portions of the pool plant and producer milk definitions of the Texas order. Specifically, the action continues the suspension of the 60-percent delivery standard for pooling cooperative association plants, the limitation on the types of pool plants at which milk receipts are used to determine the amount of milk that a cooperative may divert to nonpool plants, and the limits on the amount of milk that a pool plant operator may divert to nonpool plants. In addition, the shipping standards for pooling supply plants under the order, and the individual producer performance standards that must be met to be eligible to be diverted to a nonpool plant, also are suspended for August 1988 through July 1989. The continuation of the suspension, and the suspension of the additional provisions, were requested by Associated Milk Producers, Inc., and Mid-America Dairymen, Inc., cooperative associations that represent a substantial proportion of the producers who supply milk to the market. The action is necessary to give handlers the flexibility to dispose of the market's increasing milk supplies without engaging in uneconomic movements of milk solely for the purpose of insuring that dairy farmers who have historically supplied the fluid milk needs of the market would continue to have their milk pooled and priced under the order.

FOR FURTHER INFORMATION CONTACT: John F. Borovies, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-2089.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding:

Notice of proposed suspension: Issued August 3, 1988; published August 8, 1988 (53 FR 29689).

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. This action lessens the regulatory impact of the order on certain milk handlers and tends to ensure that dairy farmers will continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under the criteria contained therein.

This order of suspension is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and of the order regulating the handling of milk in the Texas marketing area.

Notice of proposed rulemaking was published in the **Federal Register** on August 8, 1988 (53 FR 29689) concerning a proposed suspension of certain provisions of the order. Interested persons were afforded opportunity to file written data, views, and arguments thereon. No opposing views were received.

After consideration of all relevant material, including the proposal in the notice, the comments received, and other available information, it is hereby found and determined that for the months of August 1988 through July 1989 the following provisions of the order do not tend to effectuate the declared policy of the Act:

1. In § 1126.7(d) introductory text, the words "during the months of February through July" and the words "under paragraph (b) or (c) of this section".

2. In § 1126.7(e) introductory text, the words "and 60 percent or more of the producer milk of members of the cooperative association (excluding such milk that is received at or diverted from pool plants described in paragraphs (b), (c) and (d) of this section) is physically received during the month in the form of a bulk fluid milk product at pool plants described in paragraph (a) of this section either directly from farms or by transfer from plants of the cooperative association for which pool plant status under this paragraph has been requested".

3. In § 1126.13(e)(1), the words "and further, during each of the months of September through January not less than 15 percent of the milk of such dairy farmer is physically received as producer milk at a pool plant".

4. In § 1126.13(e)(2), the paragraph references "(a), (b), (c), and (d)".

5. In § 1126.13(e)(3), the sentence, "The total quantity of milk so diverted during the month shall not exceed one-third of the producer milk physically received at such pool plant during the month that is eligible to be diverted by the plant operator;"

Statement of Consideration

This action continues, for the months of August 1988 through July 1989, a suspension of portions of the pool plant and producer milk definitions of the Texas order. Specifically, the action continues the suspension of the 60-percent delivery standard for pool plants operated by cooperative associations, the restriction on the types of pool plants at which milk must be received to establish the maximum amount of milk that a cooperative may divert to nonpool plants, and the limits on the amount of milk that a pool plant operator may divert to nonpool plants. In addition, for the same time period, the action suspends the shipping standards that must be met by supply plants to be pooled under the order and the individual producer performance standards that must be met in order for a producer's milk to be eligible for diversion to a nonpool plant.

The order provides for pooling a cooperative association plant located in the marketing area if at least 60 percent of the producer milk of members of the cooperative association is physically received at pool distributing plants during the month. Also, a cooperative association may divert to nonpool plants up to one-third of the amount of milk that the cooperative causes to be physically received at pool distributing and supply plants during the month. In addition, the order provides that the operator of a pool plant may divert to nonpool plants not more than one-third of the milk that is physically received during the month at the handler's pool plant. The suspension would inactivate the 60-percent delivery standard for plants operated by a cooperative association, allow a cooperative's deliveries to all types of pool plants to be included as a basis from which the diversion allowance would be computed, and remove the diversion limitation applicable to the operator of a pool plant. Such provisions were suspended during March–July 1988.

The order also provides for regulating a supply plant each month in which it ships a sufficient percentage of its receipts to distributing plants. The order provides for pooling a supply plant that ships 15 percent of its milk receipts during August and December and 50 percent of its receipts during September through November and January. A supply plant that is pooled during each of the immediately preceding months of September through January is pooled under the order during the following months of February through July without making qualifying shipments to distributing plants. The requested suspension would remove these performance standards during August 1988 through July 1989 for supply plants that were regulated under the Texas order during each of the immediately preceding months of September through January.

The order also specifies that the milk of each producer must be physically received at a pool plant in order to be eligible for diversion to a nonpool plant. During the months of September through January, 15 percent of a producer's milk must be received at a pool plant for diversion eligibility. The suspension would remove the 15 percent delivery requirement. It is noted that such action represents a minor modification of the provisions that were originally proposed to be suspeneded. The modification is based on comments received from one of the cooperative associations that originally requested the suspension. Upon further review, the cooperative indicated that it would not be necessary to remove all of the conditions that are applicable to producer milk eligibility for diversion purposes. Thus, the suspension does not remove the requirement that the milk of a producer must first be received at a pool plant in order to be eligible for diversion to a nonpool plant.

The continuation of the current suspension, as well as the additional suspension of the supply plant and producer performance standards, were requested by two cooperative associations (Associated Milk Producers, Inc., and Mid-America Dairymen, Inc.) that represent a substantial proportion of the dairy farmers who supply the Texas market. Associated Milk Producers operates supply-balancing plants that are pooled under the order and Mid-America operates a supply plant in southwestern Missouri that has historically been pooled under the Texas order.

As indicated by the cooperatives, the suspension is necessary because of production increases by Texas dairy farmers. As a result of substantially greater production, supplies of milk are more than ample to meet fluid milk needs and significant quantities of milk will have to be shipped to nonpool plants for use in manufactured dairy products. In addition, it is unlikely that additional supplies of milk from southwestern Missouri will be necessary in the coming months to supplement fluid milk needs of distributing plants. As a result, the suspension is necessary to give handlers the flexibility to dispose of excess milk supplies in the most efficient manner and to eliminate costly and inefficient movements of milk that would be made solely for the purpose of pooling the milk of dairy farmers who have historically supplied the Texas market.

It is hereby found and determined that thirty days' notice of the effective date hereof is impractical, unnecessary and contrary to the public interest in that:

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing area in that such action will eliminate unnecessary milk movements and ensure that dairy farmers who have been supplying the market's fluid requirements will continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

(b) This suspension does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of proposed rulemaking was given interested parties and they were afforded opportunity to file written data, views or arguments concerning this suspension. No opposing views were received.

Therefore, good cause exists for making this order effective upon publication in the **Federal Register.**

List of Subjects in 7 CFR Part 1126

Milk marketing orders, Milk, Dairy products.

It is therefore ordered, That the following provisions of the Texas order are hereby suspended for the months of August 1988 through July 1989.

PART 1126—MILK IN THE TEXAS MARKETING AREA

1. The authority citation for 7 CFR Part 1126 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

§ 1126.7 [Temporarily suspended in part]

2. In § 1126.7(d) introductory text, the words "during the months of February through July" and the words "under paragraph (b) or (c) of this section".

3. In § 1126.7(e) introductory text, the words "and 60 percent or more of the producer milk of members of the cooperative association (excluding such milk that is received at or diverted from pool plants described in paragraphs (b), (c) and (d) of this section) is physically received during the month in the form of a bulk fluid milk product at pool plants described in paragraph (a) of this section either directly from farms or by transfer from plants of the cooperative association for which pool plant status under this paragraph has been requested".

§ 1126.13 [Temporarily suspended in part]

4. In 1126.13(e)(1), the words "and further, during each of the months of September through January not less than 15 percent of the milk of such dairy farmer is physically received as producer milk at a pool plant".

5. In § 1126.13(e)(2), the paragraph references "(a), (b), (c), and (d)".

6. In § 1126.13(e)(3), the sentence, "The total quantity of milk so diverted during the month shall not exceed one-third of the producer milk physically received at such pool plant during the month that is eligible to be diverted by the plant operator;"

Signed at Washington, DC, on August 23, 1988.

Robert Melland,

Deputy Assistant Secretary of Agriculture, Marketing and Inspection Services.

[FR Doc. 88-19639 Filed 8-29-88; 8:45am]

BILLING CODE 3410-02-M

FEDERAL HOME LOAN BANK BOARD

12 CFR Parts 500 and 501

[No. 88-694]

Nomenclature Change; and Miscellaneous Conforming Technical Amendments

Date: August 16, 1988

AGENCY: Federal Home Loan Bank Board.

ACTION: Final rule; nomenclature change; and miscellaneous conforming and technical amendments.

SUMMARY: The Federal Home Loan Bank Board ("Board") is amending its regulations: (1) To reflect the current organization of the Board's Office of District Banks; and (2) To correct typographical and other technical errors contained in the Board's regulations.

EFFECTIVE DATE: August 30, 1988.

FOR FURTHER INFORMATION CONTACT: Cindy L. Hausch, Financial Analyst, (202) 377-7488; Kathy O'Dea, Assistant Director (202) 377-6789; or Patrick G. Berbakos, Director (202) 377-6720, Office of District Banks, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552.

Pursuant to 12 CFR 508.11 and 508.14, the Board finds that, because of the minor, technical nature of these corrective amendments, notice and public procedure are unnecessary, as is the 30-day delay of the effective date.

List of Subjects in 12 CFR Parts 500 and 501

Accounting, Administrative practice and procedure, Bank deposit insurance, Claims, Investments, Organization and channeling of functions, Reporting and recordkeeping requirements, and Savings and loan associations.

Accordingly, the Federal Home Loan Bank Board hereby amends Parts 500 and 501, Subchapter A, Title 12, *Code of Federal Regulations*, as set forth below.

CHAPTER V—FEDERAL HOME LOAN BANK BOARD

SUBCHAPTER A—GENERAL

PART 500—ORGANIZATION AND CHANNELING OF FUNCTIONS

1. The authority citation for Part 500 continues to read as follows:

Authority: Sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 402, 48 Stat. 1256, as amended (12 U.S.C. 1725); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071; Reorg. Plan No. 6 of 1961, *reprinted in* 12 U.S.C.A. 1437 App. (West Supp. 1986).

2. Section 500.13 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 500.13 Director of the Office of Management Systems and Administration.

* * * * *

(a) The Financial Management Division is responsible for the administration and management of the internal financial operations of the Board and the headquarters of the Federal Savings and Loan Insurance Corporation, including budgeting, accounting, receipt, and disbursement of funds; control, processing, and payment of expenses; and maintenance of pay and leave records. * * *

* * * * *

3. Revise § 500.19 to read as follows:

§ 500.19 Director of the Office of District Banks.

The Director of the Office of District Banks serves as chief liaison between the 12 Federal Home Loan Banks ("district banks") and the Federal Home Loan Bank Board and oversees the operations and financial programs of each district bank. The Director is responsible for ensuring that the district banks conform with applicable laws as well as Board regulations and policies and for arranging annual audits of each of the district banks. The office is responsible for processing, reviewing, and evaluating certain applications to the Board and the Federal Savings and Loan Insurance Corporation, except for applications which are approved by other agents or offices of the Board pursuant to delegated authority. The Director is responsible for conducting elections of elected directors and for identifying and recommending the appointment of appointed directors of each Federal Home Loan Bank. The Office of District Banks is divided into three units: Application Analysis and Policy Division; Bank Operations Division; and Bank Systems and Reports Division.

§ 500.2 [Removed and reserved]

4. Remove § 500.21 and reserve the section designation for future use.

PART 501—OPERATIONS

5. The authority citation for Part 501 continues to read as follows:

Authority: Sec. 17, 47 Stat. 736, as amended, (12 U.S.C. 1437); secs. 402, 403, 48 Stat. 1256, 1257, as amended (12 U.S.C. 1725, 1726); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071; Reorg. Plan No. 6 of 1961, *reprinted in* 12 U.S.C.A. 1437 App. (West Supp. 1986).

6. Amend § 501.10 by revising paragraph (a) to read as follows:

§ 500.10 Officers as agents.

* * * * *

(a) Such agents shall see that all Federal savings and loan associations and other insured institutions in the agent's bank district submit for consideration such matters as applications for Board action pursuant to the various sections of the Federal Regulations as delegated, the hearing of oral argument and making recommendation to the Board, and such similar matters as are required to be acted upon by the Board or the Federal Savings and Loan Insurance Corporation by statute, rule, or regulation.

* * * * *

7. Amend § 501.11 by revising paragraph (d) to read as follows:

§ 501.11 Designation of Principal Supervising Agent and Supervisory Agents.

* * * * *

(d) He shall see that Federal savings and loan associations and other insured institutions in his bank district submit to him for his consideration such matters as applications for Board action pursuant to the various sections of the Federal Regulations as delegated, the hearing of oral argument and making recommendation to the Board, and such similar matters as are required to be acted upon by the Board or the Federal Savings and Loan Insurance Corporation by statute, rule, or regulation. When these matters come to the attention of said agent he shall, after giving them due consideration, submit them, together with such supplemental information as may be available to him, to the Board with his recommendations thereon.

* * * * *

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 88-19573 Filed 8-29-88; 8:45 am]

BILLING CODE 6720-01-M

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12 CFR Part 574

[No. 88-810]

Acquisition of Control of Insured Institutions; Delegations of Authority and Technical Amendments

Date: August 18, 1988

AGENCY: Federal Home Loan Bank Board.

ACTION: Final rule; delegations of authority and revision of filing procedures; solicitation of comments.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC" or "the Corporation"), is amending the provisions of 12 CFR Part 574 to expand the authority of the Board's Principal Supervisory Agents ("PSAs") at the Federal Home Loan Banks ("FHLBanks") to approve and disapprove change of control notices and applications by eliminating paragraphs (i) and (v) of § 574.8(a)(1), which preclude PSAs from approving or disapproving acquisitions of insured institutions that involve certain securities filings made with the Board under the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.* (the "Exchange Act"), or the Board's securities offering regulations at 12 CFR Part 563g. In addition, the Board is delegating to the PSAs the authority to accept or reject certain rebuttal of control and rebuttal of concerted action submissions filed pursuant to 12 CFR Part 574. Finally, the Board is taking this opportunity to make various technical amendments that will streamline and update Part 574, as more fully described in the preamble to this final rule.

DATES: Effective August 30, 1988. Comments must be received on or before October 31, 1988.

ADDRESS: Send comments to Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552. Comments will be available for public inspection at the Board's Information Services Office at 801 17th Street, NW., Washington, DC 20552.

FOR FURTHER INFORMATION CONTACT: Robyn Dennis, Financial Analyst, (202) 778–2660, Corporate Activities Section, Office of Regulatory Activities, Federal Home Loan Bank System, 801 Seventeenth Street NW., Washington, DC 20552; J. Amanda Machen, Assistant Deputy Director, (202) 377–7398; Jeff Miner, Assistant Deputy Director, (202) 377–7546; Kevin A. Corcoran, Deputy Director for Corporate Transactions, (202) 377–6962; V. Gerard Comizio, Director, (202) 377–6411; or Julie L. Williams, Deputy General Counsel for Securities and Corporate Structure, (202) 377–6459, Corporate and Securities Division, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street, NW, Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

Acquisitions and Notices

Paragraphs (a)(1) and (2) of 12 CFR 574.8 delegate to each PSA authority to approve or disapprove any acquisition application or notice filed under § 574.3(a) or (b), provided certain criteria are met. Prior to the amendments described herein, there were six such criteria. By the action described herein, the Board is eliminating the following two of those criteria:

(1) Neither the acquiror nor the insured institution to be acquired, or any affiliate of either, is required under the Exchange Act, 15 U.S.C. 78a–78jj, and Part 563d of this chapter, to make a filing with the Board under any of the following regulations in connection with the transaction in which the acquisition would occur:

(A) Rule 13e–3, 17 CFR 240.13e–3 (for "going private" transactions);

(B) Rule 13e–4, 17 CFR 240.13e–4 (for tender offers by an issuer for its own stock);

(C) Regulation 14A, 17 CFR 240.14a–1 through 240.14a–101 (for solicitation of proxies);

(D) Regulation 14C, 17 CFR 240.14c–1 through 240.14c–101 (for distribution of information statements in lieu of solicitation of proxies); or

(E) Regulations 14D or 14E, 17 CFR 240.14d–1 through 240.14f–1 (for tender offers); and

(2) Neither the insured institution to be acquired nor the acquiror is required under Section 563g.2 of this chapter to file an offering circular with the Board in connection with the acquisition.

As a result of the above two provisions, all acquisitions that have involved the aforementioned types of securities filings with the Board have, in the past, required review either by the Board or the Board's Washington staff. The Board, at the time it promulgated the above two provisions, stated two reasons for requiring all such acquisition applications and notices to be processed in Washington. First, the Board noted that acquisitions requiring securities filings with the Board often involve institutions that have recently converted to the stock form. *See* 50 FR 48,686, 48,711 (Nov. 26, 1985). The Board was concerned that acquisitions involving such institutions could raise "special issues" requiring scrutiny by the Board or the Board's Washington staff. *Id.* After several years of experience with such applications and notices, however, the Board believes it would now be appropriate to delegate acquisitions involving securities filings to the PSA level. The Board feels confident, on the basis of the transactions it and its Washington staff have processed during the past several years as a result of the currently structured system of delegations, that the issues generally presented by acquisitions of recently converted institutions have been identified and adequately addressed either by regulation or by the establishment of Bank Board System policies, procedures, and internal applications processing guidelines. Of course, to the extent that an acquisition involving a securities filing presents a significant issue of law or policy, or another aspect that renders it ineligible for action by the PSA, it will still come to the Board or the Washington staff for a decision.

The second reason stated by the Board, at the time the above two provisions were promulgated, for requiring acquisitions involving securities filings to be reviewed in Washington was efficiency. The Board reasoned that since the Washington staff would be reviewing securities filings made in connection with such acquisitions, certain efficiencies and economies of scale might result from having the Washington staff also review the acquisition applications themselves. 50 FR at 48,711; 51 FR 40,127, 40,137 (Nov. 5, 1986). The Board has found, however, that the dates on which acquisition applications and notices and the related securities filings are submitted to the Board may differ to an extent that efficiencies do not result. As a result, the applications and notices and the related securities filings are frequently processed serially, rather than concurrently. Depending upon the manner in which an applicant chooses to schedule a transaction, an acquisition application or notice and the related securities filing may be submitted a month or more apart.

Thus, the Board has decided to expand the current delegations of authority to the PSAs to delegate responsibility for acquisition applications and notices involving securities filings to the PSA level in an effort to further streamline the agency's procedures. This action is consistent with the Board's efforts on a number of fronts to improve the efficiency of the agency's application processing procedures.[1]

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[1] It is important to note that the Board has found that information is often gleaned from a securities filing that is helpful in reviewing an acquisition application or notice and vice versa. The Board does not believe that delegating responsibility for processing acquisition applications and notices involving securities filings to the PSAs should result in any significant diminution in the agency's ability to take advantage of such information, especially since the Federal Home Loan Banks receive copies of many of the types of securities filings that are processed by the Board's Washington staff. The Board's Washington staff and staff of the FHLBanks are in frequent contact and routinely seek input from one another, and the Board will continue to

Continued

Rebuttal Filings

By Resolution No. 85–1005, dated November 25, 1985, the Board adopted a formalized process by which an acquiror could attempt to rebut certain determinations of control or presumptions of action in concert that may arise in connection with the acquisition of stock, equity, or proxies of an insured institution (or holding company thereof) under specified circumstances. The Board thereby established an expedited process for the resolution of questions as to whether an investor has the power to control or influence an insured institution.

After more than two years of experience with the rebuttal regulations, the Board believes that the review of rebuttal of control determinations and presumptions of action in concert can be further expedited. Therefore, the Board is delegating authority to the PSAs to act under specified circumstances to accept or reject rebuttal of control and action in concert filings. The PSA will have delegated authority if the following conditions are met:

(1) With a rebuttal of control filing, the acquiror has submitted an executed agreement that conforms in material respects to the agreement set forth at § 574.100;

(2) The filing does not raise novel or significant issues of law or policy. Such issues may include, but are not limited to:

(a) The acquiror is in violation of provisions of Part 574, such as the requirement to file and obtain clearance of a rebuttal of control or concerted action filing *before* making an acquisition or taking other action that would give rise to a rebuttable determination of control or concerted action under § 574.4 (b) or (d);

(b) The applicable control factor arises as a result of holding revocable or irrevocable proxies;

(3) The proposed acquisition is not opposed by the institution whose securities are to be acquired, and there is no competing acquiror for the institution's securities.

(4) The acquisition does not arise in the context of a conversion under Part 563b of the Insurance Regulations.

If any of these conditions are not met, the acquiror must file the rebuttal submission with the Federal Home Loan Bank System's Office of Regulatory Activities and the Board's Office of General Counsel. These Offices will continue to have delegated authority to determine whether the control determination or the presumption of concerted action has been rebutted. It is the Board's view that filings that do not meet the above conditions frequently raise complex or precedential legal issues or present supervisory considerations with system-wide implications, which warrant review by the Board's Washington staff. In any case where a rebuttal filing raises a significant issue of law or policy, however, only the Board itself would have authority to act on the filing. Given the nature of rebuttal filings, the Board expects such situations to be rare.

The Board also is partially modifying the time frames within which the FSLIC may determine that a rebuttal submission is sufficient. The Corporation or its delegate will continue to be required to provide notification, within 20 calendar days after proper filing of a rebuttal submission, of its determination to accept or reject the submission, request additional information, or return the submission as materially deficient. However, the Corporation or its delegate must provide such notification within 15 calendar days of the proper filing of any additional information furnished in response to a specific request. The amendment is intended to retain the expedited 20-day time frame for review of rebuttal submissions while at the same time conforming these time frames to the time frames applicable to processing acquisition applications and notices under other portions of Part 574 as well as the FSLIC's general guidelines for processing applications. *See* 12 CFR 571.12. In addition, the Board is amending its recently-adopted filing requirements to specify that non-delegated rebuttal submissions must be filed directly with the Secretariat, the Office of Regulatory Activities, the Office of General Counsel, and the Principal Supervisory Agent for the insured institution. *See* 12 CFR 574.6.

Also, the Board is amending its rebuttal procedures to require that, when the Board or its delegate agrees to accept a rebuttal of control, the acquiror must transmit a copy of the executed agreement to the insured institution or holding company to which the rebuttal pertains. This step should enhance the effectiveness of the rebuttal process since the affected institution is best situated to know whether or not an acquiror is complying with the undertakings contained in the rebuttal agreement.

The Board is also taking this opportunity to make a technical amendment to Part 574. Section 574.6(b) (1), (3), (4), and (5) (filing requirements for acquisition applications and notices and rebuttal submissions) is being merged into one omnibus paragraph regarding filing procedures, thereby eliminating a substantial amount of duplicative text from Part 574.

Finally, the Board has directed the Office of Regulatory Activities and the Office of General Counsel to develop guidelines and methods for alerting the FHLBanks to issues and types of transactions that present significant issues of law or policy. These guidelines will be issued to the FHLBanks concurrently with the delegation. The Board also anticipates that in conjunction with the significantly enhanced delegations implemented by these amendments, that a post audit function of all rebuttal decisions made by the FHLBanks will be performed in order to monitor the decisions rendered at the FHLBank level.

The foregoing changes are effective August 30, 1988 and are applicable to filings made after such date.

Because these changes are nonsubstantive, the Board finds that observance of the notice and comment procedure prusuant to 5 U.S.C. 553(b) and 12 CFR 508.11 and the 30-day delay of effective date pursuant to 5 U.S.C. 553(d) and 12 CFR 508.14 is unnecessary and contrary to the public interest. However, the Board is soliciting comments from interested parties as to how the Board's current regulations related to the review and processing of rebuttal submissions, and the changes adopted today, may be further improved. Comments should be submitted within sixty days of the effective date of this final rule.

List of Subjects in 12 CFR Part 574

Administrative practice and procedure, Holding companies, Savings and loan associations, Securities.

Accordingly, the Board hereby amends Part 574, Subchapter D, Chapter V, Title 12, Code of Federal Regulations, as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 574—ACQUISITION OF CONTROL OF INSURED INSTITUTIONS

1. The authority citation for Part 574 continues to read as follows:

Authority: Sec. 407, 48 Stat. 1260, as amended (12 U.S.C. 1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a).

2. Amend Section 574.4 by revising paragraphs (e)(1)(i) and (e)(3) to read as follows and by removing the reference to "§ 574.6(b)(6)" in paragraph (f)(2) and

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encourage frequent exchange of inforamtion so as to promote the highest possible quality of review of acquisition applications and notices and securities filings.

by inserting in lieu thereof the phrase "§ 574.6(b)(3)":

§ 574.4 Control.

* * * * *

(e) *Procedures for rebuttal*—(1) *Rebuttal of control determination.* * * *

(i) An acquiror seeking to rebut the determination of control arising under paragraph (b)(1) of this section shall submit to the Corporation and executed agreement materially conforming to the agreement set forth at § 574.100 of this Part. Unless agreed to by the Corporation or its delegate in writing, no other agreement or filing shall be deemed to rebut the determination of control arising under paragraph (b)(1) of this section. If accepted by the Corporation or its delegate, the acquiror shall furnish a copy of the executed agreement to the institution to which the rebuttal pertains.

* * * * *

(3) *Determination.* A rebuttal filed pursuant to paragraph (e) of this section shall not be deemed sufficient unless it includes all the information, agreements, and affidavits required by the Corporation and this Part, as well as any additional relevant information as the Corporation or its delegate may require by written request to the acquiror. Within 20 calendar days after proper filing of a rebuttal submission, the Corporation or its delegate will provide written notification of its determination to accept or reject the submission; request additional information in connection with the submission; or return the submission to the acquiror as materially deficient. Within 15 calendar days after proper filing of any additional information furnished in response to a specific request by the Corporation or its delegate, the Corporation or its delegate shall notify the acquiror in writing as to whether the rebuttal is thereby deemed to be sufficient. If the Corporation or its delegate fails to notify an acquiror within such time, the rebuttal shall be deemed to be accepted. The Corporation or its delegate may reject any rebuttal which is inconsistent with facts and circumstances known to them or where the rebuttal does not clearly and convincingly refute the rebuttable determination of control or presumption of action in concert, and may determine to reject a submission solely on such bases.

* * * * *

§ 574.5 [Amended.]

3. Amend § 574.5 by removing the reference to "§ 574.6(b)(7)" in paragraph (a)(1) and by inserting in lieu thereof the phrase "§ 574.6(b)(4)".

4. Amend § 574.6 by revising paragraph (b)(1) to read as follows; by removing paragraphs (b)(3), (4), and (5) and by redesignating paragraphs (b)(6), (7), (8), and (9) as the paragraphs (b)(3), (4), (5), and (6); and by amending newly redesignated paragraphs (b)(4), (5), and (6) by removing the reference to "paragraph (b)(6)" in these paragraphs and by inserting in lieu thereof the phrase "paragraph (b)(3)".

§ 574.6 Procedural requirements.

* * * * *

(b) *Filing requirements*—(1) *Applications, notices, and rebuttals.* (i) Complete copies including exhibits and all other pertinent documents of applications, notices, and rebuttal submissions that are not eligible to be processed under delegated authority pursuant to § 574.8(a) of this Part shall be filed as follows: one copy with the Office of the Secretariat, Federal Home Loan Bank Board, Washington, DC 20552, labeled "Dockets Copy;" one (manually executed) copy with the Corporate and Securities Division, Office of General Counsel, Federal Home Loan Bank Board, Washington, DC 20552; one copy with the Corporate Activities Section, Office of Regulatory Activities, 801 Seventeenth Street NW., Washington, DC 20552; and one copy with the Principal Supervisory Agent of the district in which the insured institution or institutions involved in the transaction have their home office or offices. Unsigned copies shall be conformed.

(ii) Complete copies including exhibits and all other pertinent documents of applications, notices, and rebuttal submissions eligible to be processed under delegated authority pursuant to § 574.8(a) of this Part shall be filed as follows: two copies with the Principal Supervisory Agent of the district in which the insured institution or institutions involved in the transaction have their home office or offices (including one manually executed copy); and one copy with the Office of the Secretariat, Federal Home Loan Bank Board, Washington, DC 20552. Unsigned copies shall be conformed. Each copy shall include a summary of the proposed transaction including an explanation of why the application, notice, or rebuttal submission may be processed under delegated authority, and an affirmative representation that none of the factors specified in § 574.8(a) that would preclude action under delegated authority are present. Such statement shall be clearly labeled "Statement Regarding Eligibility for Processing Under Delegated Authority." If the person or company making the submission subsequently becomes aware of additional information or changed circumstances that would alter the eligibility of the application, notice, or rebuttal submission of processing under delegated authority, the company or person shall promptly so advise the Principal Supervisory Agent in writing.

(iii) All companies submitting applications under Section 574.3 of this Part shall comply with Section 7A of the Clayton Act (15 U.S.C. 18A) and regulations issued thereunder (Parts 801, 802, and 803 of Title 16 of the *Code of Federal Regulations*).

(iv) Any acquiror filing a notice with respect to acquisition of a state-chartered institution shall file an additional copy of the notice with the Principal Supervisory Agent and label such copy "State Supervisor Copy."

(v) Any person or company may amend an application, notice, or rebuttal submission, or file additional information with respect thereto, upon request of the Principal Supervisory Agent or the Corporation or its delegate or, in the case of the party filing an application, notice, or rebuttal, upon such party's own initiative.

* * * * *

5. Amend § 574.8 by removing paragraphs (a)(1)(i) and (v) and by redesignating existing paragraphs (a)(1)(ii), (iii), (iv), and (vi) as the new paragraphs (a)(1)(i), (ii), (iii), and (iv); by redesignating paragraphs (a)(2), (3), and (4) as the new paragraphs (a)(3), (4), and (5); by adding a new paragraph (a)(2); and by revising newly redesignated paragraphs (a)(3), (a)(4) introductory text, (a)(4)(ii), and (a)(5) to read as follows:

§ 574.8 Delegations of authority.

(a) *Actions by the Principal Supervisory Agent*—(1) *Approval.* * * *

(2) *Acceptance.* The Principal Supervisory Agent is authorized to accept a rebuttal filed under Section 574.4(e) of this Part where the following conditions are met:

(i) With a rebuttal of control, the acquiror submits an executed rebuttal agreement that conforms in material respects to the agreement set forth in § 574.100;

(ii) The rebuttal does not raise significant issues of law or policy;

(iii) The proposed acquisition of securities or other action covered by the rebuttal is not opposed by the institution whose securities are to be acquired and there is no competing acquiror for the institution's securities; and

(iv) The acquisition is not part of a conversion under Part 563b of this chapter.

(3) *Denial.* The Principal Supervisory Agent is authorized to disapprove any application or notice that he is authorized to approve or for which he is authorized to issue a statement of intent not to disapprove under paragraph (a)(1) of this section. The Principal Supervisory Agent is authorized to reject any rebuttal that he is authorized to accept under paragraph (a)(2) of this section. Such disapproval or rejection shall be in writing, shall set forth with specificity the basis for disapproval or rejection, and shall be furnished promptly to the acquiror.

(4) *Other actions.* For notices filed pursuant to Section 574.3(b) of this Part, and applications filed pursuant to Section 574.3(a) of this Art, and rebuttals filed pursuant to Section 574.4(e) of this Part, which may be approved under paragraph (a) of this section, the Principal Supervisory Agent may take the following actions:

* * * * *

(ii) A determination that an application or notice is sufficient or requires additional information under Section 574.6(c)(1) of this Part, or that a rebuttal of control is sufficient or requires additional information under Section 574.4(e)(3) of this Part;

* * * * *

(5) *Appeal.* Denial of an application or notice or rejection of a rebuttal by a Principal Supervisory Agent pursuant to paragraph (a) of this section may be appealed to the Corporation under the following procedures: Within 20 days after notification of the Principal Supervisory Agent's decision as provided herein, the acquiror must notify the Office of the Secretariat in writing of the acquiror's desire to appeal the Principal Supervisory Agent's decision. Two copies of such request for review must be submitted to the Office of the Secretariat, Federal Home Loan Bank Board, Washington, DC 20552, with one copy indicated "Attention: Corporate Activities Section, Office of Regulatory Activities" and a second copy indicated "Attention: Corporate and Securities Division, Office of General Counsel." A third copy should be sent to the appropriate Principal Supervisory Agent. The request for review must identify the party seeking review and describe with specificity the action taken for which review is sought and the reasons why the Principal Supervisory Agent's denial or notice of disapproval or rejection is contended to be erroneous. If an applicant does not file an appeal with in the time permitted under this section, any objection to the Principal Supervisory Agent's action is waived. A timely appeal filed with the Secretariat in accordance with the provisions of this section shall be mandatory for securing judicial review of an initial determination.

* * * * *

6. Add a new § 574.100 to read as follows:

§ 574.100 Rebuttal of control agreement.

Agreement

Rebuttal of Rebuttable Determination Of Control Under Part 574

I. WHEREAS

A. [ ] is the owner of [ ] shares (the "Shares") of the [ ] stock (the "Stock") of [name and address of institution], which Shares represent [ ] percent of a class of "voting stock" of [ ] as defined under the Federal Home Loan Bank Board's ("Board") Acquisition of Control Regulations ("Regulations") 12 C.F.R. Part 574 ("Voting Stock");

B. [ ] is an "insured institution" within the meaning of the Regulations;

C. [ ] seeks to acquire additional shares of stock of [ ] ("Additional Shares"), such that [ ]'s ownership thereof will exceed 10 percent of a class of Voting Stock but will not exceed 25 percent of a class of Voting Stock of [ ];

[and/or]

[ ] seeks to [ ], which would constitute the acquisition of a "control factor" as defined in the Regulations ("Control Factor");

D. [ ] does not seek to acquire the [Additional Shares or Control Factor] for the purpose or effect of changing the control of [ ] or in connection with or as a participant in any transaction having such purpose or effect;

E. The regulations require a company or a person who intendes to hold 10 percent or more but not in excess of 25 percent of any class of Voting Stock of an insured institution or holding company thereof and that also would possess any of the control factors specified in the Regulations, to file and obtain approval of an application ("Application") under the Savings and Loan Holding Company Act ("Holding Company Act"), 12 U.S.C. Section 1730a, or file and obtain clearance of a notice ("Notice") under the Change in Savings and Loan Control Act of 1978 ("Control Act"), 12 U.S.C. Section 1730(q), prior to acquiring such amount of stock and a Control Factor unless the rebuttable determination of control has been rebutted.

F. Under the Regulations, [ ] would be determined to be in control, subject to rebuttal, of [ ] upon acquisition of the [Additional Shares or Control Factor];

G. [ ] has no intention to manage or control, directly or indirectly, [ ];

H. [ ] has filed on [ ], a written statement seeking to rebut the determination of control, attached hereto and incorporated by reference herein, (this submission referred to as the "Rebuttal");

I. In order to rebut the rebuttable determination of control, [ ] agrees to offer this Agreement as evidence that the acquisition of the [Additional Shares or Control Factor] as proposed would not constitute an acquisition of control under the Regulations.

II. The FSLIC has determined, and hereby agrees, to act favorably on the Reubuttal, and in consideration of an FSLIC determination and agreement to act favorably on the Rebuttal, [ ] and any other existing, resulting a successor of [ ] agree with the FSLIC that:

A. Unless [ ] shall have filed a Notice under the Control Act, or an Application under the Holding Company Act, as appropriate, and either shall have obtained approval of the Application or clearance of the Notice in accordance with the Regulations, [ ] will not, except as expressly permitted otherwise herein or pursuant to an amendment to this Rebuttal Agreement.

1. Seek or accept representation of more than one member of the board of directors of [insert name of institution and any holding company thereof];

2. Have or seek to have any representative serve as the chairman of the board of directors, or chairman of an executive or similar committee of [insert name of institution and any holding company thereof]'s board of directors or as president or chief executive officer of [insert name of institution and any holding company thereof];

3. Engage in any intercompany transaction with [ ] or [ ]'s affiliates;

4. Propose a director in opposition to nominees proposed by the management of [insert name of institution and any holding company thereof] for the board of directors of [insert name of institution and any holding company thereof] other than as permitted in paragraph A–1;

5. Solicit proxies or participate in any solicitation of proxies with respect to any matter presented to the stockholders [ ] other than in support of, or in opposition to, a solicitation conducted on behalf of management of [ ];

6. Do any of the following, except as necessary solely in connection with [ ]'s performance of duties as a member of [ ]'s board of directors:

(a) Influence or attempt to influence in any respect the loan and credit decisions or policies of [ ], the pricing of services, any personnel decisions, the location of any offices, branching, the hours of operation or similar activities of [ ];

(b) Influence or attempt to influence the dividend policies and practices of [ ] or any decisions or policies of [ ] as to the offering or exchange of any securities;

(c) Seek to amend, or otherwise take action to change, the bylaws, articles of incorporation, or character of [ ];

(d) Exercise, or attempt to exercise, directly or indirectly, control or a controlling influence over the management, policies or business operations of [ ]; or

(e) Seek or accept access to any non-public information concerning [ ].

B. [ ] is not a party to any agreement with [ ].

C. [ ] shall not assist, aid or abet any of [ ]'s affiliates or associates that are not parties to this Agreement to act, or act in concert with any person or company, in a manner which is inconsistent with the terms hereof or which constitutes an attempt to evade the requirements of this Agreement.

D. Any amendment to this Agreement shall only be proposed in connection with an amended rebuttal filed by [ ] with the FSLIC for its determination or a determination pursuant to delegated authority;

E. Prior to to acquisition of any shares of "Voting Stock" of [ ] as defined in the Regulation in excess of the Additional Shares, any required filing will be made by [ ] under the Control Act or the Holding Company Act and either approval of the acquisition under the Holding Company Act shall be obtained from the FSLIC or any Notice filed under the Control Act shall be cleared in accordance with the Regulations;

F. At any time during the 10 percent or more of any class of Voting Stock of [ ] is owned or controlled by [ ], no action which is inconsistent with the provisions of this Agreement shall be taken by [ ] until [ ] files and either obtains from the FSLIC a favorable determination with respect to either an amended rebuttal, approval of an Application under the Holding Company Act, or clearance of a Notice under the Control Act, in accordance with the Regulations;

G. Where any amended rebuttal filed by [ ] is denied or disapproved, [ ] shall take no action which is inconsistent with the terms of this Agreement, except after either (1) reducing the amount of shares of Voting Stock of [ ] owned or controlled by [ ] to an amount under 10 percent of a class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations; or (2) filing a Notice under the Control Act, or an Application under the Holding Company Act, as appropriate, and either obtaining approval of the Application or clearance of the Notice, in accordance with the Regulations;

H. Where any Application or Notice filed by [ ] is disapproved, [ ] shall take no action which is inconsistent with the terms of this Agreement, except after reducing the amount of shares of Voting Stock of [ ] owned or controlled by [ ] to an amount under 10 percent of any class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

I. Should circumstances beyond [ ]'s control result in [ ] being placed in a position to direct the management or policies of [ ], then [ ] shall either (1) promptly file an Application under the Holding Company Act or a Notice under the Control Act, as appropriate, and take no affirmative steps to enlarge that control pending either a final determination with respect to the Application or Notice, or (2) promptly reduce the amount of shares of [ ] Voting Stock owned or controlled by [ ] to an amount under 10 percent of any class of Voting Stock or immediately cease any actions that give rise to a conclusive or rebuttable determination of control under the Regulation;

J. By entering into this Agreement and by offering it for reliance in reaching a decision on the request to rebut the presumption of control under the Regulations, as long as 10 percent or more of any class of Voting Stock of [ ] is owned or controlled, directly or indirectly, by [ ], and [ ] possesses any Control Factor as defined in the Regulations, [ ] will submit to the jurisdiction of the Regulations, including (1) the filing of an amended rebuttal or Application or Notice for any proposed action which is prohibited by this Agreement, and (2) the provisions relating to a penalty for any person who willfully violates the [Holding Company Act or Control Act] and the Regulations thereunder, and any regulation or order issued by the FSLIC.

K. Any violation of this Agreement shall be deemed to be a violation of the [Holding Company Act or Control Act] and the Regulations, and shall be subject to such remedies and procedures as are provided in the [Holding Company Act or Control Act] and the Regulations for a violation thereunder and in addition shall be subject to any such additional remedies and procedures as are provided under any other applicable statutes or regulations for a violation, willful or otherwise, of any agreement entered into with the FSLIC.

III. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which counterparts collectively shall constitute one instrument representing the Agreement among the parties thereto. It shall not be necessary that any one counterpart be signed by all of the parties hereto as long as each of the parties has signed at least one counterpart.

IV. This Agreement shall be interpreted in a manner consistent with the provisions of the Rules and Regulations of the Board.

V. This Agreement shall terminate upon (i) the approval by the Board of [ ]'s Application under the Holding Company Act or clearance by the Board of [ ]'s Notice under the Control Act to acquire [ ], and consummation of the transaction as described in such Application or Notice, or in the disposition by [ ] of a sufficient number of shares of [ ], or the taking of such other action that thereafter [ ] is not in control and would not be determined to be in control of [ ] under the Control Act, the Holding Company Act or the Regulations of the Board under either in effect at that time.

VI. IN WITNESS THEREOF, the parties thereto have executed this Agreement by their duly authorized officer.

____

[Acquiror]

Federal Savings and Loan Insurance Corporation.

Date: ________________________

By: ________________________

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 88-19572 Filed 8-29-88; 8:45 am]

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1201

Statement of Organization and General Information

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: NASA is amending 14 CFR Part 1201, "Statement of Organization and General Information," to reflect the current organizational structure and to make editorial corrections. This regulation sets forth NASA's policy and functions as established by the National Aeronautics and Space Act of 1958, as amended.

EFFECTIVE DATE: August 30, 1988.

ADDRESS: General Management Division, Code NPN-1, NASA Headquarters, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Margaret M. Herring, 20.2 453-2922.

SUPPLEMENTARY INFORMATION: NASA is revising §§ 1201.200 and 1201.400 to reflect the current organizational structure and to make editorial corrections. In § 1201.200(a)(1) the position title "Associate Deputy Administrator (Policy)" is changed to "Associate Deputy Administrator." § 1201.200(a)(3) is rewritten for clarification. § 1201.200(b)(8) is changed from the National Space Technology Laboratories to the John C. Stennis Space Center, Stennis Space Center, MS 39529. A correction is also made to § 1201.400(c) which corrects "48 U.S.C." to "48 CFR."

Since this revision involves internal administrative decisions and editorial changes, no public comment period is required.

The National Aeronautics and Space Administration has determined that:

1. This rule is not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, since it will not exert a significant economic impact on a substantial number of small entities.

2. This rule is not a major rule as defined in Executive Order 12291.

List of Subjects in 14 CFR Part 1201

Organization and functions (Goverment agencies).

For reasons set forth in the Preamble, 14 CFR Part 1201 is amended as follows:

PART 1201—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

1. The authority citation for 14 CFR Part 1201 continues to read as follows:

Authority: 5 U.S.C. 552, as amended.

2. Section 1201.200 is amended by revising paragraphs (a)(1), (a)(3), and (c)(8) to read as follows:

§ 1201.200 General.

(a) * * *

(1) The Office of the Administrator which includes the Administrator, Deputy Administrator, Associate Deputy Administrator, Associate Deputy Administrator (Institution), Assistant Deputy Administrator, and the Executive Officer.

* * * * *

(3) Fourteen Headquarters Offices. Thirteen of these offices provide agencywide leadership in certain administrative and specialized areas and one office provides administrative operations for Headquarters. All of these offices report directly to the Office of the Administrator.

* * * * *

(c) * * *

(8) John C. Stennis Space Center, Stennis Space Center, MS 39529.

* * * * *

3. Section 1201.400 is amended by revising paragraph (c) to read as follows:

§ 1201.400 NASA procurement program.

* * * * *

(c) All procurements are made in accordance with the Federal Acquisition Regulation (FAR) (48 CFR Chapter 1) and the Federal Acquisition Regulation Supplement (NASA/FAR Supplement) (48 CFR Chapter 18). Copies of these publications are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, on an annual subscription basis.

James C. Fletcher,
Administrator.
August 23, 1988.

[FR Doc. 88-19874 Filed 8-29-88; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 74, 81, and 82

[Docket No. 87N-0160]

D&C Red No. 33

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDS) is permanently listing D&C Red No. 33 for general use in drugs and cosmetics, except for use in the area of the eye. This action is in response to petitions filed by several petitioners. This rule will remove D&C Red No. 33 from the provisional list of color additives for general use in drugs and cosmetics.

DATES: Effective September 30, 1988, except for any provisions that may be stayed by the filing of proper objections; written objections and requests for a hearing by September 29, 1988.

ADDRESS: Written objections may be sent to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Patricia J. McLaughlin, Center for Food Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202-472-5740.

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I. Introduction

In 1960, Congress passed the Color Additive Amendments (the amendments). In *Certified Color Mfg. Ass'n* v. *Mathews*, 543 F.2d 284, 286–287 (D.C. Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit explained the purpose of this legislation:

> The Color Additive Amendments of 1960 reflect a Congressional and administrative response to the need in contemporary society for a scientifically and administratively sound basis for determining the safety of artificial color additives, widely used for coloring food, drugs, and cosmetics. The Amendments reflect a general unwillingness to allow widespread use of such products in the absence of scientific information on the effect of these products on the human body. The previously used system had some glaring deficiencies, and the 1960 Amendments were designed to overcome them. * * *

(Footnotes omitted)

As amended, section 706(a) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 376(a)) provides that a color additive will be deemed unsafe for use in food, drugs, cosmetics, and some medical devices unless FDA has issued a regulation permanently listing that color additive for its intended use. FDA will issue such a regulation only if it has been presented with data that establish with reasonable certainty that no harm will result from the use of the color additive. The burden of presenting such data is on the person who is seeking approval of the use of the additive.

In passing the amendments, Congress provided for the provisional listing of the color additives in use at that time, pending completion of the scientific investigations needed for a determination about the safety of these additives (section 203(b) of the transitional provisions of the amendments, Title II, Pub. L. 86–618, 74 Stat. 404–407 (21 U.S.C. 376, note)). Section 81.1 (21 CFR 81.1) of the agency's color additive regulations enumerates those color additives that are still provisionally listed. Among them is D&C Red No. 33 for use in drugs and cosmetics.

II. Regulatory History

A. The Color Additive

D&C Red No. 33, a dull bluish red dye of the monoazo class, is identified in *Chemical Abstracts* as the disodium salt of 5-amino-4-hydroxy-3-(phenylazo)-2,7-naphthalenedisulfonic acid (CAS Reg. No. 3567–66–6). It is indentified in § 82.1333 (21 CFR 82.1333) as the disodium salt of 8-amino-2-phenylazo-1-naphtol-3,6-disulfonic acid. Other names include Colour Index Food Red 12 (C.I. No. 17200), C.I. Acid Red 33, Fast Acid Magenta B, and Acid Fuchsin D.

In manufacturing the additive, the product obtained from the nitrous acid diazotization of aniline is coupled with 4-hydroxy-5-amino-2,7-naphthalenedisulfonic acid in a alkaline aqueous medium. D&C Red No. 33 is soluble in water and glycerol and slightly soluble in methanol and ethanol.

D&C Red No. 33 is used in ingested drug preparations and in cosmetics subject to ingestion, such as lipsticks, dentifrices, mouthwashes, and breath fresheners. It is also used in externally applied cosmetics such as noncoloring hair preparations, skin care, fragrance, and make-up products.

The color additive D&C Red No. 33 has been in use for many years. Because D&C Red No. 33 was in use at the time the Color Additive Amendments of 1960 were enacted, it was provisionally listed for drug and cosmetic use in the **Federal Register** of October 12, 1960 (25 FR 9759).

In the **Federal Register** of October 12, 1960 (25 FR 9759), the agency established temporary tolerances for the provisional listing of certain color additives, including D&C Red No. 33, for use in lipsticks, ingested drugs, and other products subject to ingestion, such as mouthwashes and dentifrices. The original temporary tolerances, based on preliminary usage information and toxicity data available at that time, were intended to limit use of the color additive to safe levels until all required toxicity tests were completed. The agency has revised the temporary tolerances over the years as additional data became available, the lastest revision being on August 21, 1979 (44 FR 48964). D&C Red No. 33 usage is limited under the temporary tolerances in 21 CFR 81.25 to 3.0 percent by weight in lip cosmetics, to 0.75 milligram (mg) per daily dose of drugs, and to amounts consistent with current good manufacturing practice in mouthwashes and dentifrices.

Between 1960 and February 4, 1977, FDA postponed the closing date for the provisional listing of D&C Red No. 33 several times. The agency granted these postponements in response to requests for additional time to complete the scientific investigations necessary for listing the color additive under section 706 of the act.

B. Color Additive Petitions

In the **Federal Register** of November 20, 1968 (33 FR 17205), FDA announced that a petition (CAP 8C0086) for the permanent listing of D&C Red No. 33 as a color additive for use in ingested drugs, lipsticks, and externally applied drugs and cosmetics had been filed by the Toilet Goods Association, Inc. (now the Cosmetic, Toiletry and Fragrance Association (CTFA)), the Pharmaceutical Manufacturers Association (PMA), and the Certified Color Industry Committee (now the Certified Color Manufacturers Association, Inc. (CCMA)), c/o Hazleton Laboratories, Inc., P.O. Box 30, Falls Church, VA 22046 (now 9200 Leesburg Turnpike, Vienna, VA 22180).

The petition was filed under section 706 of the act (21 U.S.C. 376). A later notice (41 FR 9584; March 5, 1976) amended the notice of filing of the petition to include the use of D&C Red No. 33 in all types of cosmetics subject to ingestion and the additional use of D&C Red No. 33 in cosmetics intended for use in the area of the eye.

FDA notified the petitioners by letters dated May 14, 1976, August 15, 1977, and August 4, 1978, of the need for data to support the use of D&C Red No. 33 in cosmetics intended for use in the area of the eye. In a fourth letter, dated October 24, 1978, FDA advised the petitioners to consider withdrawing the portion of the petition that sought approval of the use of D&C Red No. 33 in cosmetics intended for use in the area of the eye because it appeared that the required data from eye-area studies were not readily available.

The petitioners have not submitted the required data on eye-area use. Therefore, FDA considers that portion of the petition that relates to the listing of D&C Red No. 33 for eye-area use to be withdrawn without prejudice in accordance with the provisions of § 71.4

(21 CFR 71.4). Use of D&C Red No. 33 in the area of the eye has never been covered by the provisional listing of this color additive.

The petitioners for CAP 8C0086 originally requested a regulation permitting up to 5.5 mg of D&C Red No. 33 per daily dose in ingested drugs, up to 3 percent of the color additive in cosmetics subject to ingestion, and use in amounts consistent with current good manufacturing practice in other cosmetics and topically applied drugs.

In February 1988, the petitioners amended their proposed tolerances to request that use of D&C Red No. 33 be limited to 0.75 mg per daily dose in ingested drugs. These uses and limitations are the same as the current uses and limitations under the provisional listing of this color additive.

In the **Federal Register** of August 6, 1973 (38 FR 21200), FDA announced that a petition (CAP 7C0059) for the permanent listing of D&C Red No. 33 as a color additive for use in drugs and cosmetics for external applications also had been filed by the Procter and Gamble Co., Toilet Goods Division, 6000 Center Hill Rd., Cincinnati, OH 45224. The petition was filed under section 706 of the act (21 U.S.C. 376).

C. Toxicological Testing of D&C Red No. 33

In the **Federal Register** of February 4, 1977 (42 FR 6992), FDA published revised regulations that required new chronic toxicity studies on 31 color additives, including D&C Red No. 33, as a condition for continued provisional listing for ingested uses. FDA required the new toxicity studies because the earlier toxicity studies that the petitioners had submitted to support the safe use of these color additives were deficient in several respects. FDA described these deficiencies in the **Federal Register** of September 23, 1976 (41 FR 41860):

> 1. Many of the studies were conducted using groups of animals, i.e., control and those fed the color additive, that are too small to permit conclusions to be drawn today on the chronic toxicity or carcinogenic potential of the color. The small number of animals used does not, in and of itself, cause this result, but when considered together with the other deficiencies in this listing, does do so. By and large, the studies used 25 animals in each group; today FDA recommends using at least 50 animals per group.
>
> 2. In a number of the studies, the number of animals surviving to a meaningful age was inadequate to permit conclusions to be drawn today on the chronic toxicity or carcinogenic potential of the color additives tested.
>
> 3. In a number of the studies, an insufficient number of animals was reviewed histologically.
>
> 4. In a number of the studies, an insufficient number of tissues was examined in those animals selected for pathology.
>
> 5. In a number of the studies, lesions or tumors detected under gross examination were not examined microscopically.

In the February 4, 1977 rule, FDA postponed the closing date for the provisional listing of the color additives until January 31, 1981, for the completion of required toxicity studies. Subsequently, FDA published amendments to the provisional regulations in the **Federal Register** of April 7, 1978 (43 FR 14642), that required a new multigeneration reproduction study for D&C Red No. 33 as another condition of its continued provisional listing. The deficiency in the reproduction study previously submitted by the petitioners to support the safe use of the color additive was described in the **Federal Register** of December 13, 1977 (42 FR 62497; Docket No. 76N–0366). FDA found the study to be inadequate for assessing the potential for the color additive to affect reproduction adversely following ingestion. The selection of test animals for the succeeding generations was not made randomly, introducing a possible bias in the outcome of the studies. Evaluation of weaning weights of the animals to be used for subsequent generations disclosed that heavier, and, therefore, presumably healthier, test animals were selected in more instances than would have been dictated by random selection. This is an improper manner of selection as test animals selected for subsequent breeding should be representative of the available animals as a whole. The possible bias that was introduced by not selecting animals randomly but rather by weight may have resulted in the nonselection of animals exhibiting adverse effects.

In the **Federal Register** of March 27, 1981 (46 FR 18954), FDA established the closing date of March 31, 1983, for the completion of the evaluation of D&C Red No. 33. Because its review of the data and of the scientific and legal issues raised on this color additive took longer than the agency anticipated, FDA had to extend the provisional listing of the color additive on a number of occasions. On June 26, 1985 (50 FR 26377), FDA proposed a longer extension of the provisional listing for several color additives, including D&C Red No. 33, to provide for the submission of additional information. On September 4, 1985 (50 FR 35783), the agency published a final rule extending the provisional listing for D&C Red No. 33 until March 3, 1987. On July 30, 1986, CTFA submitted additional information, which is discussed below. To provide time for the completion of its review and preparation of the appropriate documents, the agency further extended the closing date several times. The most recent extension was announced in the **Federal Register** on July 1, 1988 (53 FR 25127), establishing the current closing data of August 30, 1988.

d. Citizen Petition Filed by Public Citizen Health Research Group

On December 17, 1984, the Public Citizen Health Research Group (Public Citizen) petitioned FDA to ban the use of the color additives that remained provisionally listed. On January 22, 1985, Public Citizen filed a complaint in the District Court for the District of Columbia seeking the same relief. Public Citizen alleged that, by continuing to provisionally list the color additives, including D&C Red No. 33, FDA had violated the Color Additive Amendments to the act, as well as those provisions of the Administrative Procedure Act (5 U.S.C. 706(1)) that pertain to unreasonable delay of agency action. Public Citizen sought to enjoin FDA from using the provisional list or any other means to allow the marketing of the provisionally listed color additives.

On June 21, 1985, the Commissioner of Food and Drugs sent to Public Citizen a detailed response to the petition. In his response, the Commissioner carefully reviewed and discussed the arguments and information submitted in support of the petition. The Commissioner concluded that the public health would not be endangered by the continued marketing of the color additives while scientific, legal, and policy issues were addressed and, therefore, the Commissioner denied the petition.

On February 13, 1986, Judge Stanley S. Harris granted FDA's motion for summary judgment and dismissed Public Citizen's complaint. *Public Citizen, et al.* v. *DHHS, et al.*, No. 85–1573 (D.D.C. February 13, 1986). Public Citizen's appeal of this decision was denied by the U.S. Court of Appeals, No. 86–5150 (October 23, 1987).

III. Evaluation of the Safety of D&C Red No. 33

A. *Statutory Safety Requirements*

Under section 706(b)(4) of the act (21 U.S.C. 376 (b)(4)), the so-called "general safety clause" for color additives, a color additive cannot be listed for a particular use unless the data presented to FDA establish that it is safe for that use. Although what is meant by "safe" is not explained in the general safety clause, the legislative history makes clear that this word is to have the same meaning for color additives as for food additives. (See H. Rept. No. 1761, "Color Additive Amendments of 1960," Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. 11 (1960).) The Senate report on the Food Additives Amendment of 1958 states:

> The concept of safety used in this legislation involves the question of whether a substance is hazardous to the health of man or animal. Safety requires proof of a reasonable certainty that no harm will result from the proposed use of an additive. It does not—and cannot—require proof beyond any possible doubt that no harm will result under any conceivable circumstances.
>
> This was emphasized particularly by the scientific panel which testified before the subcommittee. The scientists pointed out that it is impossible in the present state of scientific knowledge to establish with complete certainty the absolute harmlessness of any chemical substance.

S. Rept. No. 2422, "Food Additives Amendment of 1958," Committee on Labor and Public Welfare, 85th Cong., 2d Sess. 6 (1958).

FDA has incorporated this concept of safety into its color additive regulations. Under 21 CFR 70.3(i), a color additive is "safe" if "there is convincing evidence that establishes with reasonable certainty that no harm will result from the intended use of the color additive." Therefore, the general safety clause prohibits approval of a color additive if doubts about the safety of the additive for a particular use are not resolved to an acceptable level in the minds of competent scientists.

The general safety clause is buttressed by the anticancer or Delaney clause (section 706(b)(5)(B) of the act), which provides that a color additive shall be deemed to be unsafe "for any use which will or may result in ingestion of all or part of such additive, if the additive is found by the Secretary to induce cancer when ingested by man or animal, or if it is found by the Secretary, after tests which are appropriate for the evaluation of the safety of additives for use in food, to induce cancer in man or animal," and it shall be deemed unsafe "for any use which will not result in ingestion of any part of such additive, if, after tests which are appropriate for the evaluation of the safety of additives for such use, or after other relevant exposure of man or animal to such additive, it is found by the Secretary to induce cancer in man or animal" (21 U.S.C. 376(b)(5)(B)).

The application of the Delaney clause to color additives was amplified recently by a decision concerning D&C Orange No. 17 and D&C Red No. 19 in *Public Citizen, et al.* v. *Young, et al.* (D.C. Cir. No. 86-1548, October 23, 1987):

> In sum, we hold that the Delaney Clause of the Color Additive Amendments does not contain an implicit *de minimis* exception for carcinogenic dyes with trivial risks to humans. We based this decision on our understanding that Congress adopted an "extraordinarily rigid" position, denying the FDA authority to list a dye once it found it to "induce cancer in * * * animals" in the conventional sense of the term.

B. Earlier Studies

Among the earlier toxicity studies on the color additive, submitted by the petitioners before 1977, were acute oral toxicity studies in rats, dogs, and mice; short-term and chronic feeding studies in dogs and rats; a three-generation reproduction study in rats; teratology studies in rats and rabbits; dermal studies in rabbits; and 2-year skin-painting studies in mice. Some toxic effects, including hemolytic anemia and enlarged spleens, were observed at higher doses in the pre-1977 feeding studies, but the agency concluded that the color additive could be used safely until the completion of further testing.

From the earlier studies with D&C Red No. 33 submitted by the petitioners, the agency has evaluated the dermal safety of the color additive. The data from these studies demonstrate that D&G Red No. 33 is nonirritating when applied repeatedly to either intact or abraded skin. Furthermore, D&C Red No. 33 was not found to be carcinogenic in two studies in which it was applied periodically to the skin of mice over their lifetimes.

FDA has evaluated the genetic toxicity tests related to D&C Red No. 33 found in the literature. The available information is fragmentary and inconsistent, and the agency considers the full complement of animal toxicity studies to provide more pertinent information on safety than these in vitro tests. FDA finds no basis for further concerns in this information.

C. New Studies

In the new reproduction study required by the April 7, 1978, order, Sprague-Dawley (Charles River) COBS CD rats were fed dietary levels of 0, 0.25, 2.5, 7.5, and 25 milligrams per kilogram (mg/kg) per day of D&C Red No. 33. Twenty females and 20 males for each group were used to initiate the study, which was conducted for three generations. The selection of test animals for the succeeding generations was made randomly. Examination of a number of indices of viability, health, reproductive abnormality, and developmental toxicity in offspring and mothers did not reveal any pattern of adverse effects. From evaluation of the new multigeneration reproduction study in rats and of earlier teratology studies, agency scientists have concluded that there have been no reproductive or teratogenic effects related to treatment with the color additive.

Reports were submitted to FDA on the new chronic toxicity studies in rats and mice required by the February 4, 1977, order. These new studies represent current state-of-the-art toxicological testing. The protocols for these studies have benefited from knowledge of deficiencies in previously conducted carcinogenesis bioassays and other chronic toxicity protocols. The use of large numbers of animals of both sexes, pilot studies to determine maximum tolerated dosages, two control groups (thereby effectively doubling the number of controls), and in utero exposure in one of the two species tested, significantly increase the power of these tests to detect dose-related effects.

The reproduction and chronic studies were conducted for the petitioner by International Research and Development Corp., Mattawan, MI 49071. The color additive fed to the animals in theses studies contained 88 percent total color.

In the new chronic mouse study, D&C Red No. 33 was fed to Charles River CD-1 mice at dietary levels of 0, 0.1, 1, and 5 percent. Sixty females and 60 males were used for each dietary level and in each of 2 control groups. The male mice fed 5 percent D&C Red No. 33 were sacrificed at 57 weeks and the female mice fed 5 percent were sacrificed at 74 weeks due to reduced survival. All other groups were sacrificed at 104 weeks of feeding. The mice fed 1 and 5 percent of D&C Red No. 33, compared to the controls, showed hemolytic anemia and associated adverse effects, but no adverse effects were seen in mice fed 0.1 percent. No increased incidence of tumors was related to feeding of the test substance. Based on the evaluation of the results of this chronic mouse toxicity study, the agency has determined that D&C Red No. 33 did not cause cancer in Charles River CD-1 mice.

In one chronic study, Sprague-Dawley (Charles River CD) rats were fed dietary levels of 0, 0.25, 0.05, and 0.2 percent D&C Red No. 33 for 129 weeks. These rats were exposed in utero and during lactation by the feeding of the same dietary levels of D&C Red No. 33 to their parents. Seventy females and 70 males were used for each dietary level and in each of 2 control groups.

A related second study was performed with the same strain of rats, in which the animals, similarly exposed in utero and during lactation, were fed either 0 or 2 percent of D&C Red No. 33. FDA requested that this feeding level be added to provide testing at the highest level compatible with completion of the test. The agency's analysis of data from earlier studies suggested that this maximum level of 2 percent could be used without jeopardizing completion of the study. The males were sacrificed at 113 weeks of feeding and the females at 117 weeks. There were 70 animals of each sex in each group.

Tests rats in both studies showed adverse effects associated with hemolytic anemia. Decreases in erythrocyte counts, decreases in hemoglobin levels, and increases in reticulocyte counts were seen at the 0.2 percent and the 2 percent doses. Also at the 0.2 percent dose, the males had increased spleen/body weight ratios at the 12-month sacrifice and the females had increased spleen weights at the end of the study. No adverse effects were seen at the 0.05 percent level or below.

In the second rat study, survival of males fed 2.0 percent was less than the controls and the body weights of treated rats were decreased compared to controls. The treated rats of both sexes showed enlargement of the spleen at 12 months and also at termination of the study. Both sexes of the treated group showed a marked increase in parenchymal fibrosis of the spleen compared to their controls. Both sexes also had splenic capsular fibrosis, and, in addition, the males showed fatty metamorphosis. In the spleens of the 140 treated rats, the agency also found a few uncommon tumors: three fibrosarcomas and one hemangioma in males and one fibroma in females. One male control rat had a hemangiosarcoma. The incidences of the various tumors are not sufficient to show carcinogenicity. Based on the evaluation of the results of both chronic rat studies, the agency has determined that D&C Red No. 33 did not cause cancer in Sprague-Dawley rats.

D. The Issue of Whether More Testing is Necessary

1. *Statement of the issue.* In a notice of proposed rulemaking (50 FR 26377; June 26, 1985), FDA stated that the chronic testing of both D&C Red No. 33 and D&C Red No. 36 did not reveal a carcinogenic effect in the animals in which they were tested. FDA noted increased incidences of unusual, nonneoplastic splenic lesions in Sprague-Dawley rats fed high doses of D&C Red No. 33. There were higher incidences of parenchymal fibrosis, enlargement, capsular fibrosis, and (in males) fatty metamorphosis of the spleen in animals fed the test compound than in the control animals. In the 140 rats fed D&C Red No. 33 there were three fibrosarcomas, one hemangioma, and one fibroma.

In the proposal, FDA stated that if it had only results of the testing of D&C Red No. 33 and D&C Red No. 36 before it, the agency would likely have approved the use of these color additives in spite of the observed effects. However, the proliferative effects seen in the testing of D&C Red No. 33 and D&C Red No. 36 indicated to FDA that there was a similarity between these color additives and certain other compounds, such as D&C Red No. 9, that have been shown to be carcinogenic. When D&C Red No. 9 was fed to Sprague-Dawley rats, a few rare tumors and numerous rare lesions of the spleen were produced. These rats had the same kinds of nonneoplastic lesions as with D&C Red No. 33 and D&C Red No. 36. When D&C Red No. 9 was fed to Fischer 344 rats, however, numerous rare tumors of the spleen were produced, and D&C Red No. 9 was found to be a splenic carcinogen in this strain.

The association of the nonneoplastic splenic lesions with tumor occurrence suggested to FDA that the nonneoplastic lesions may be precursors or indicators of the start of a carcinogenic process. This similarity of effects in the Sprague-Dawley strain of rats between D&C Red No. 33, on the one hand, and D&C Red No. 9, on the other, raised concerns that D&C Red No. 33 may be carcinogenic in the Fischer 344 rat. To clarify the significance of this similarity of effects, FDA proposed that new studies be conducted on D&C Red No. 33 and D&C Red No. 36 (50 FR 26377; June 26, 1985). The agency stated that it believed that such studies would be the best way to resolve the ambiguities about these color additives that had been created by the results of the testing with D&C Red No. 9 and other compounds in Fischer 344 rats. The agency also noted, however, that it would reconsider the issue of additional testing if data and information were received that showed that such testing was not necessary.

As part of its effort to resolve this problem, FDA, in 1984, had asked that a panel of experts from the National Toxicology Program's Board of Scientific Counselors examine the data on D&C Red No. 33 in conjunction with the data on D&C Red No. 9. FDA sought the guidance of the Board on two questions: "(1) Do the results of the long-term feeding studies of D&C Red No. 33 in CD-1 (Charles River) mice and Sprague-Dawley (Charles River) rats indicate a possible carcinogenic effect that could be attributed to exposure to this color additive? (2) In particular, do the splenic changes in rats constitute evidence of neoplastic potential?"

The Board met on July 26, 1984, and provided the following response:

> 1. Quantitatively, the low incidence rates for primary mesenchymal neoplasms of the spleen in male and female Charles River CD-1 rats given long term dietary administration of 2% D&C Red No. 33 could not be considered sufficient to be categorized as a demonstrated carcinogenic response to chemical treatment.
>
> 2. Qualitatively, there appears to be treatment-related nonneoplastic target organ (spleen) toxic responses which are similar to those previously described for certain other aromatic azo compounds, aromatic nitro compounds, and amines.
>
> 3. Further research is necessary and should be directed toward developing understanding of the mechanisms of the toxic action of this particular family of compounds in the spleen of rats. (Ref. 1).

FDA agrees with the Board's first point and concludes that the evidence does not establish D&C Red No. 33 to be a carcinogen. The incidences of splenic tumors in Sprague-Dawley rats (produced by Charles River) do not show carcinogenicity.

The agency agrees with the Board's second point, that there were similar nonneoplastic splenic effects produced with D&C Red No. 33 as there were with others in this family of compounds. FDA acted on this basis in publishing the proposal on June 26, 1985 (50 FR 26377).

The Board's third recommendation was intended to apply to the narrow question of what is needed to further scientific understanding, and not what is needed to protect the public health.

The petitioners' comments on the 1985 proposal suggested that conducting a risk assessment based on the comparative toxicities of D&C Red No. 9, D&C Red No. 33, and D&C Red No. 36 in Sprague-Dawley rats would show that additional testing would not be necessary to protect the public health. The petitioner later submitted a lengthy comparative assessment on the relative splenic toxicities of the three color additives.

2. *Resolution of the issue.* The agency carefully considered the petitioners' comments and concluded that, if the splenic toxicity associated with the use of these color additives were produced by the major components of the colors, then it should be possible to evaluate the health concern raised by the color additives using the data from the studies involving the Sprague-Dawley rat and the D&C Red No. 9 study in the Fischer 344 rat. FDA concluded that knowledge of the relative toxicities of these additives would enable the agency to make a determination about the safety

of D&C Red No. 33 and D&C Red No. 36 without requiring new long-term studies (50 FR 35783 at 35788; September 4, 1985).

FDA has conducted its own comparative evaluation based on the relative toxicities of D&C Red No. 9 and D&C Red No. 33 (Ref. 2). The assessment shows that, even assuming that D&C Red No. 33 were carcinogenic if subjected to further testing in a strain of rat other than the Sprague-Dawley, the theoretical, upper-bound, lifetime risk associated with exaggerated use exposure to the compound would be extremely small, that is, less than 3×10^{-7} (Ref. 3).

In light of this comparative evaluation, the agency has reconsidered whether additional chronic testing of D&C Red No. 33 is necessary to establish the safety of the compound. When deciding whether to require additional testing for a compound under review, the agency routinely follows the principle articulated in its toxicology guidelines that "the degree of effort expended in reducing uncertainty about the safety of an additive ought to relate in some concrete way to the likelihood that the substance poses a potential for health risk to the public * * *." (Ref. 4, p. 10). By showing that the splenic toxicity presents no reasonable likelihood of harm to the public, the assessment adequately responds to the agency's initial concern that additional testing of the additive would be necessary to protect the public health. In fact, in light of the assessment, to require additional testing would be pointless from a public health perspective and contrary to agency practice.

Accordingly, the agency concludes that the existing carcinogenicity studies concerning D&C Red No. 33 are adequate for the evaluation of the color additive.

E. Summary of the Safety Evidence for D&C Red No. 33

1. *Adequacy of the submitted studies to demonstrate safety.* The series of studies completed by the petitioner satisfies the usual requirements to demonstrate safety for a color additive that will be ingested and applied dermally. The studies were properly conducted and are acceptable under today's standards of toxicity testing. Agency scientists have found no adverse effects related to treatment with the color additive in doses up to the highest dose of 25 mg/kg in the teratology studies or in the 3-generation reproduction studies. The long-term studies in dogs, mice, and rats all showed the hemolytic anemia syndrome prominently at high doses. The highest dose level that did not show this syndrome was 150 mg/kg (0.1 percent) in mice, 12.5 mg/kg in dogs, and 25 mg/kg (0.05 percent) in rats. Thus, the safety studies established a no-observed-effect-level of 12.5 mg/kg body weight or higher in all species tested.

Based on its evaluation of these studies and on its analysis of concerns raised by studies on D&C Red No. 9, the agency concludes that the data show that no harm will result from using D&C Red No. 33 under the conditions prescribed.

2. *Negative results of carcinogenicity studies.* As discussed above, the agency believes that these studies are adequate to determine whether D&C Red No. 33 is carcinogenic. No significant increased incidence of any type of tumor, in any of the many tissues examined, in either sex, in any dose group, in any strain of any species tested, by either ingestion or skin application, was associated with D&C Red No. 33 treatment in any of the studies. Thus, after thorough evaluation of these studies, which meet modern design standards for tests to determine carcinogenicity, the agency finds that D&C Red No. 33 has not induced cancer in any of the laboratory testing. As stated above, the National Toxicology Program's Board of Scientific Counselors has also concluded that the data do not demonstrate a carcinogenic response to treatment. Accordingly, the Delaney clause is not applicable to the decision on this color additive.

3. *Conclusion.* For the foregoing reasons, the agency considers that the direct testing of D&C Red No. 33 show that the color additive is safe for use in drugs and cosmetics.

IV. Potential Carcinogenic Impurities

For the reasons discussed above, the agency considers that the direct testing of D&C Red No. 33 shows that the color additive is safe for use in drugs and cosmetics. The agency must still consider, however, any risk posed by possible carcinogenic impurities in D&C Red No. 33.

A. The Impurities Found

During the safety review, the agency developed a new analytical methodology for examining the color additive for the presence of trace level impurities. Analyses by this new methodology found six carcinogenic impurities in commercial, certified batches of D&C Red No. 33 (Refs. 5 and 6). The carcinogenic impurities that the agency detected are 4-aminoazobenzene, 4-aminobiphenyl, aniline, azobenzene, benzidine, and 1,3-diphenyltriazene. These impurities result from impurities in the starting materials used to manufacture the color additive, remaining traces of starting material, and from reactions involving these impurities during the manufacturing process. The regulation set forth below establishes specifications that would limit the concentrations of all six of these impurities in future batches.

Because of its concerns about the carcinogenic impurities, the agency has analyzed representative samples from 10 certified batches of the color additive (Refs. 5 and 6). The results of the analyses, expressed as concentration in parts per billion (ppb), for the 6 carcinogenic impurities in these 10 batches are summarized in Table I.

TABLE I.—LEVELS OF IMPURITIES FOUND IN D&C RED NO. 33

Impurity	No. of batches (out of 10)[a] containing detectable amounts of impurity	Range of impurity concentration (ppb)[b]	Average impurity level in 10 samples (ppb)[c]
4-Aminoazobenzene.	10	50–3, 100	500
4-Aminobiphenyl.	10	40–530	260
Aniline	10	2,000-19,900	8,300
Azobenzene	2	ND–2,200	410
Benzidine	4	ND–60	15
1,3-Diphenyltriazene.	8	ND–410	100

[a] Thirteen certified batches were analyzed but each batch was not necessarily analyzed for all six impurities. Ten batches were examined for each impurity.

[b] Approximately detectability limits: Azobenzene—200 ppb; Benzidine—1 ppb; 1,3-Diphenyltriazene—10 ppb.

[c] Impurity assumed to be present at detectability limit if not detected.

The detectability limit mentioned in the table is the approximate concentration of the impurity sufficient to cause a visible response on the chromatogram. This limit is lower than the concentration that will produce a response that can be reproducibly quantitated with good precision.

B. Prior Actions by FDA

The current testing of D&C Red No. 33 has not proven it to be a carcinogen, and, thus, the anticancer clause does not apply to it. Nevertheless, the agency must still consider whether the color additive, in light of the fact that it may contain carcinogenic impurities, may be safely used in drugs and cosmetics.

The agency is using the same approach for this situation concerning impurities in D&C Red No. 33 as it used to examine the risk associated with the presence of minor carcinogenic impurities in FD&C Yellow No. 5 (50 FR 35774; September 4, 1985), and FD&C Yellow No. 6 (51 FR 41765; November 19, 1986), both of which may contain the same impurities as those found in D&C Red No. 33. These color additives had not been shown to be carcinogenic by appropriate bioassays. FDA concluded that the use of each of these color additives, within prescribed specifications, is safe.

The agency's position is supported by *Scott* v. *FDA*, 728 F.2d 322 (6th Cir. 1984). That case involved a challenge to FDA's decision to approve the use of D&C Green No. 5 (47 FR 24278; June 4, 1982), which contains a carcinogenic chemical but has not itself been shown to cause cancer. Relying heavily on the reasoning in the agency's decision to list D&C Green No. 5, the United States Court of Appeals for the Sixth Circuit rejected the challenge to FDA's action and affirmed the listing regulations.

The assessment procedure used to estimate risk from an impurity has two aspects: (1) Assessment of the probable exposure to the impurity from the proposed use of the additive, and (2) extrapolation of carcinogenic potency observed in the animal bioassay with the impurity to the conditions of probable human exposure.

C. Exposure to Carcinogenic Impurities in D&C Red No. 33

The agency has estimated the maximum risk from exposure to the carcinogenic impurities that may result from use of D&C Red No. 33 in drugs and cosmetics. The lifetime exposure to D&C Red No. 33 is not expected to exceed 160 micrograms/person/day (θg/person/day) internally and 800 θg/person/day from dermal exposure, for the high users (Ref. 2). With these estimates, the agency has examined the likely exposures to the carcinogenic impurities in D&C Red No. 33.

In adopting specifications for D&C Red No. 33, FDA considered the concentrations of the carcinogenic impurities that were present in the certified batches of the color additive that the agency recently surveyed and in the batches used for the toxicological testing.

The agency believes that the specifications listed in the first column of Table II are readily obtainable under current good manufacturing practice and will assure safe use of the color additive.

TABLE II—ESTIMATED IMPURITY EXPOSURE AT THE SPECIFICATION LIMITS

Impurity	Specification (ppb)	High User Exposure (ng/day) [1] Systemic	Dermal
4-Aminoazobenzene	100	0.02	0.08
4-Aminobiphenyl	275	.04	
Aniline	25,000	4.0	
Azobenzene	1,000	.2	
Benzidine	20	.003	
1,3-Diphenyl-triazene	125	.02	.1

[1] ng=Nanograms (1 billionth of a gram).

Table II also gives the estimated high user exposure to the impurities if each batch of the color additive contained each impurity at the maximum level allowed by the specifications. The systemic exposure is calculated by multiplying the high user exposure for the color additive itself (160 θg/day by ingestion) by each specification. Systemic exposure to these impurities from dermal application will be negligible compared to ingestion because the major fraction of exposure to this color additive results from its ingested uses and because only a small fraction of a dermally applied product is likely to be absorbed.

Two of the impurities, 4-aminoazobenzene and 1,3-diphenyltriazene, have been shown not only to be systemic carcinogens when ingested but also to be skin carcinogens when applied dermally. Accordingly, for these two impurities, the agency has estimated the risks from dermal exposure as well as those from systemic exposure. FDA has based its estimates of dermal exposure on the high user exposure to D&C Red No. 33 (800 θg/day) multiplied by each specification (Ref. 7).

D. Risk Estimations for Impurities

The second part of the evaluation of the risk presented by the presence of the impurities is an extrapolation from the actual compound-related incidence of tumors found in animal bioassays, under conditions of exaggerated exposure, to the conditions of much lower probable exposure for humans.

The agency has used estimates of carcinogenic potency and estimates of exposures to the carcinogenic impurities for high users of D&C Red No. 33 (with all carcinogenic impurities at the maximum concentrations allowed by the specifications) to estimate risks for exposure to each impurity (Ref. 7). The agency then summed these risks to derive the maximum upper bound risk associated with lifetime exposure to D&C Red No. 33.

The agency searched the scientific literature for evidence on the carcinogenicity of the impurities found in D&C Red No. 33. If more than one study found one of these impurities to be carcinogenic, the agency identified the study that was most suitable to estimate risk. Although, in general, these studies were not designed to estimate risk and were often deficient under current standards, they are the only studies available and can not be ignored. Also, the reports did not always provide all the information necessary for a risk estimate. The agency has thus attempted to make assumptions and corrections that would provide estimates that are reasonable while not underestimating the risk. These assumptions and corrections are discussed more fully in the discussions of each constituent.

1. *4-Aminoazobenzene.* The agency has evaluated reports showing that 4-aminoazobenzene is carcinogenic in the diet of rats (Refs. 8 and 9), and that it is carcinogenic when applied dermally to rats (Ref. 10). The agency has developed a risk estimate from each of these studies.

A study implicating 4-aminoazobenzene as a carcinogen by dietary administration to Wistar rats was reported by Kirby et al. (Ref. 9). The study reported that 7 of the 16 animals in the treated group were found to have liver cell neoplasms after a total of 120 weeks. Six rats in this group displayed papillomas of the stomach. No information is available to determine whether any of the individual rats had neoplasms in both the liver and the stomach. The dose was allowed to vary throughout the experiment. The agency calculated the average dose over 120 weeks to be 0.25 percent in the diet (Ref. 11).

4-Aminoazobenzene was also implicated as a carcinogen in a skin painting study in which 1.0 milliliter (mL) of a 0.2 percent acetone solution containing 4-aminoazobenzene (corresponding to a dose of 2 mg of 4-aminoazobenzene per application) was applied to the skin twice weekly on six male albino rats. This was part of a larger study utilizing a number of azo compounds (Ref. 10). All six male rats in the treatment group displayed skin neoplasms after 123 weeks compared to none in the control group.

The agency has estimated that the lifetime risk of cancer from systemic exposure to 4-aminoazobenzene is less than 3 in 1 trillion from products containing D&C Red No. 33 (Refs. 5 and 11). The data indicate, however, that 4-aminoazobenzene may be a more potent carcinogen at the site of application to the skin than when absorbed systemically. The agency has estimated that the lifetime risk of skin cancer from dermal application is less than 2 in 1 billion (Refs. 5 and 11). Because the risk estimate for dermally applied products is larger than for ingested products, FDA is using this higher estimate to evaluate total risk.

2. *4-Aminobiphenyl.* A number of studies in different species have been performed on 4-aminobiphenyl. The agency has chosen a dog study reported both by Block et al. and by Rippe et al. for quantitative risk assessment because the data on this study yield a higher risk estimate than data from other studies (Refs. 12, 13, and 14).

In this study, 24 pure-bred female beagle dogs were administered 4-aminobiphenyl orally, by capsule, at a dosage level of 5 mg/kg body weight for 5 days a week. Cystoscopic examinations were made routinely starting at 16 months and continuing up to 41 months after commencement of treatment. Diagnoses at 24 months showed that 22 of 24 treated dogs had bladder papillomas. Because this incidence is so high, data at later times show essentially the same incidence. Data at earlier times show a lower incidence, proportional to the lesser exposure time. The agency concludes that data obtained at 24 months are the most reliable for risk assessment because, among other reasons, more complete histopathology was performed at this time (Ref. 14).

Under circumstances in which lifetime risk must be estimated from studies that are performed for less than a lifetime, the data must be corrected to account for the fact that the animals were at risk for less than a lifetime. Typically, tumor incidence has been thought to be proportional to some power of time (Ref. 15). The agency believes that, in the absence of specific data, it is reasonable to make adjustments based on a model that uses the third power of the time exposed (Refs. 14 and 15).

Because 24 months represent approximately one-fifth of the lifetime of a beagle dog, the agency has corrected for the rapid induction of these neoplasms in the calculation of lifetime risk. Extrapolating directly from the data and making a correction for less than lifetime exposure, the agency estimates that the lifetime risk of cancer from systemic exposure to 4-aminobiphenyl in products containing D&C Red No. 33 is less than 2 in 100 million (Refs. 5 and 14).

3. *Aniline.* Data reported by the National Cancer Institute (NCI) demonstrated that aniline was carcinogenic to the spleen of Fischer 344 rats (Ref. 16). This finding has subsequently been verified by a dietary study performed by the Chemical Industry Institute of Toxicology (CIIT) using the same strain of rat (Ref. 17). FDA used data from the CIIT study to estimate that the lifetime risk of cancer from systemic exposure to aniline in products containing D&C Red No. 33 is less than 4 in 100 billion (Refs. 5 and 18).

4. *Azobenzene.* In an NCI-sponsored bioassay reported in 1979, azobenzene induced a dose-related increase in the incidence of sarcomas of the abdominal cavity, particularly the spleen, in both sexes of Fischer 344 rats (Ref. 19). Three groups of animals of both sexes were given 0, 200, and 400 parts per million (ppm) in the diet. From this study, the agency estimates that systemic exposure to azobenzene in products containing D&C Red No. 33 presents a lifetime risk of less than 2 in 100 billion (Refs. 6 and 20).

5. *Benzidene.* FDA used a human epidemiology study by Zavon (Ref. 21) and a study performed by Rinde and Troll in the rhesus monkey (Ref. 22) as the basis for a quantitative risk assessment on benzidine. Zavon attempted to obtain good data on exposure to benzidine by analyzing the urine of workers in a plant that manufactures this substance. The workers were monitored until a number of them were diagnosed as having bladder neoplasms. Urine levels of benzidine in workers were measured before each work shift, after each work shift, and on every Monday morning. Average levels were: before work, 0.01 milligram per liter (mg/L); after work, 0.04 mg/L; and on Monday morning before work, somewhat below 0.005 mg/L.

No controlled study with the administration of benzidine and the concomitant measurement of benzidine in the urine in humans has been performed. Thus, the conversion from urine concentration to total exposure cannot be made from human data alone. However, the Rinde and Troll study related ingestion of benzidine to amounts of benzidine and monoacetylbenzidine in the urine of rhesus monkeys. The agency believes it is reasonable to use this study to relate urine concentration to exposure for humans (Ref. 23). This procedure yields a higher risk estimate than if the risk was estimated solely from an animal feeding study and thus is less likely to underestimate risk.

In the Rinde and Troll study, benzidine was administered orally to rhesus monkeys, and the 72-hour urine collection was analyzed for benzidine and monoacetylbenzidine. In two trials the amount of benzidine and monoacetylbenzidine excreted in the urine was 1.4 percent and 1.5 percent of the initial input. The agency used these data, and applied a safety factor of two to compensate for uncertainties, to estimate that the amount of benzidine and monoacetylbenzidine excreted in the urine of humans is approximately 3 percent of that consumed. The agency then calculated that the average human worker in the Zavon study was exposed to approximately 0.8-mg benzidine per work day. Based on these two studies, the agency estimates that systemic exposure to benzidine from products containing D&C Red No. 33 presents a lifetime risk of less than 2 in 100 million (Refs. 5 and 23).

6. *1,-Diphenyltriazene.* The agency has evaluated reports showing that 1,3-diphenyltriazene is carcinogenic in the diet, and that it is carcinogenic when applied dermally. A study performed by Otsuka (Ref. 24), while deficient in certain aspects, showed that 1,3-diphenyltriazene produced forestomach tumors in mice upon dietary exposure. The compound was administered in the diet at a concentration of 0.04 percent for 483 days. Although this dietary study is quite old and was terminated after 16 months, the agency believes that it is usable if corrected for less than lifetime exposure. Assuming that the average lifetime of a mouse is 24 months, the agency has corrected for less than lifetime exposure by assuming the risk of cancer increases as the third power of the time exposed (Refs. 15 and 25). Therefore, the agency has used a correction factor of 3.4, i.e., (24 months/16 months)^{3}, which increases the estimated risk.

Using this correction, the agency estimates that systemic exposure to 1,3-diphenyltriazene from products containing D&C Red No. 33 presents a lifetime risk of less than 4 in 1 trillion (Refs. 6 and 25).

A lifetime skin-painting study using 1,3-diphenyltriazene on mouse skin was performed by Kirby (Ref. 26). This skin study involved a thrice weekly application of a 5-percent solution of the test compound in acetone. In 16 mice surviving more than 300 days, 3 developed squamous cell papilloma and 3 developed squamous cell carcinoma. One mouse that developed a carcinoma could not be identified as part of this experiment or a parallel experiment. The agency has assumed that this mouse was part of this experiment so as not to underestimate risk. As was often the case in the 1940's, when this study was conducted, the amount of solution applied to the skin of the animals was not accurately measured and thus not reported for this experiment. The failure to measure and to report this information creates problems in conducting a quantitative risk assessment. However, in later years, the standard protocol for this kind of study in mice became the application of 0.20 mL of solution to the skin. Because the agency does not know whether as much as 0.20 mL was applied, it has made a more conservative assumption that 0.10 mL was used in order to estimate the risk. Using this procedure, the agency estimates that dermal exposure to 1,3-diphenyltriazene from products containing D&C Red No. 33 presents a lifetime risk of less than 1 in 100 billion (Refs. 6 and 25).

E. Cumulative Risk Estimates

In evaluating FD&C Yellow No. 5, the agency established a procedure of setting specifications for more than one carcinogenic constituent for the same color additive (50 FR 35774; September 4, 1985). The agency used the same procedure when it evaluated the safety of FD&C Yellow No. 6 (51 FR 41765; November 19, 1986) and is using it again in evaluating the safety of D&C Red No. 33 because it is necessary to consider the most appropriate way to evaluate the risk from simultaneously consuming small amounts of several carcinogenic agents.

The Office of Science and Technology Policy discussed the issue of exposure to multiple carcinogenic agents in a document entitled "Chemical Carcinogens; A Review of the Science and Its Associated Principles" (50 FR 10371, 10394; March 14, 1985) as follows:

> Since people are exposed to many different agents at the different times in different sequences, the effect of multiple agents on carcinogenesis is of major concern. However there is little information of general import in the field. Models for interaction are generally limited by lack of information on dose-response curves for carcinogens in the area of interest. The great number of permutations of possible agents and doses makes understanding interaction of multiple agents very difficult.
>
> In general, the action of two or more agents can be additive (if the agents are given in a dose range where the biological response is a linear function of dose) or multiplicative (if the response is a simple exponential response to dose), synergistic (greater than expected) or antagonistic (less than expected).

The agency knows of no method where by potential multiplicative, synergistic, or antagonistic interactions can be incorporated into a generalized risk assessment process. Furthrmore, at the dose levels under consideration (far below those having measurable pharmacologic or physiologic activity), the agency sees no reason to consider synergistic or antagonistic interactions. When one extrapolates carcinogenicity data downward to very low doeses, one is, in effect, assuming that the carcinogens are acting independently, and that no interactions occur. Thus, if the probability of developing cancer from one substance is independent of the probability of developing cancer from another substance, then the probability of developing cancer from either substance may be obtained from summing the individual probabilities. Therefore, in the absence of specific information on the interactions among the carcinogenic impurities, the agency believes that, operationally, the risks incurred from the presence of multiple carcinogenic impurities in a color or food additive can be considered independent, and that the estimated upper bound risks should be summed.

The individual risk estimates discussed earlier show that the impurities other than 4-aminobiphenyl and benzidine make negligible contributions to the total risk. Table III shows the total upper bound risk, estimated by summing the risk estimate from each carcinogenic impurity when present at the highest level, consistent with specifications, to be 4 in 100 million.

TABLE III—UPPER BOUND RISK ESTIMATES BASED ON SPECIFICATIONS FOR CARCINOGENIC IMPURITIES IN D&C RED NO. 33

Impurity	Lifetime cancer risk	
4-Aminoazobenzene [1]	0.000000002	$(2X10^{-9})$
4-Aminobiphenyl [1]	0.00000002	$(2X10^{-8})$
Aniline	0.00000000004	$(4X10^{-11})$
Azobenzene	0.00000000002	$(2X10^{-11})$
Benzidine	0.00000002	$(2X10^{-8})$
1,3-Diphenyltriazene [1]	0.00000000001	$(1X10^{-11})$
Sum [2]	0.00000004	$(4X10^{-8})$

[1] The risk for skin cancer is used here because it is higher than the risk estimated for systemic cancer.

[2] In summing risk estimates, numbers have been rounded off to the nearest significant figure.

The agency emphasizes that these upper bound risk estimates are worst case estimates that are used to assure that there is a reasonable certainty that use of an additive will not cause harm. Consequently, several assumptions used for the estimate tend to overestimate rather than underestimate risk. For example, the linear model used to extrapolate risk to low dose exposure is a conservative model. It is used to generate an upper bound estimate of an unknown risk, not to predict an actual risk.

Furthermore, the agency's risk estimates are based on the assumption that all carcinogenic impurities are present at the maximum concentrations allowed by the regulations. In reality, any batch with any impurity concentration above a specification would be rejected while batches with lower concentrations would be allowed. Therefore, unless all batches of certified color additive have impurity concentrations exactly at the specification limits, the average concentration of each impurity will be lower than the maximum allowed.

Finally, the agency points out that the levels of the impurities found in D&C Red No. 33 are so low that under no circumstances could a bioassay detect a carcinogenic effect from these impurities.

The agency has considered the potential presence of these impurities in other color additives as part of this evaluation. D&C Red No. 33, FD&C Yellow No. 5, and FD&C Yellow No. 6 all can contain the same carcinogenic impurities (50 FR 35774 at 35776; September 4, 1985 and 51 FR 41765 at 41774; November 19, 1986). Currently, the agency can estimate risks only for products containing these three color additives with these impurities. Simple addition of the upper bound risks for high users of each color additive (all projected to have the impurities present at the levels of the specifications) would give a value of less than 8 in 10 million. Although this value is clearly exaggerated, FDA sees no need to refine the analysis when the risk is so low.

The agency believes that the maximum risk to consumers from the use of D&C Red No. 33 alone or in combination with the other additives is sufficiently low that it can conclude that the use of batches of D&C Red No. 33 that meet the specifications adopted by this rule is safe. The agency is aware that some of these carcinogenic impurities may occur also in some color additives other than FD&C Yellow No. 5 and FD&C Yellow No. 6. Due to the small amounts of these other color additives that are manufactured, or the limited usage, FDA does not expect any noticeable risk from these sources. The agency will review any risk resulting from exposure to these impurities in other color additives, and will take whatever regulatory action is needed to protect the public health, when sufficient information is available for an appropriate decision.

V. Refrences

The following references have been placed on file at the Dockets Management Branch (address above) and may be seen in that office between 9 a.m. and 4 p.m., Monday through Friday.

1. National Toxicology Program, "Peer Review of the Data from the Chronic Carcinogenesis Animal Bioassay of D&C Red No. 33 by the Technical Reports Review Subcommittee and Panel of Experts," July 26, 1984.

2. Memorandum, McLaughlin, P.J., to File for D&C Red No. 33, "Comparative Evaluation for Additional Safety Considerations, D&C Red No. 33," July 5, 1988.

3. Memorandum, Quantitative Risk Assessment Committee, "Carcinogenicity Risk Analysis for D&C Red No. 33 and D&C Red No. 36, Including a Discussion of ENVIRON/CTFA's Risk Analysis and Incorporation of Recommendations of the Color Additive Scientific Review Panel," March 12, 1987.

4. FDA, Bureau of Foods, "Toxicological Principles for the Safety Assessment of Direct Food Additives and Color Additives Used in Food," 1982.

5. Memorandum, Link, W.B., to E. Coleman, "Amines in D&C Red No. 33," August 12, 1983.

6. Memorandum, Bailey, J.E., to E. Coleman "1,3-Diphenyltriazene and Azobenzene in D&C Red No. 33," September 19, 1983.

7. Memorandum, Quantitative Risk Assessment Committee, "Upper Bound Risks from Carcinogenic Impurities in D&C Red No. 33 and D&C Red No. 36," March 31, 1987.

8. Kirby, A.H.M., "Studies in Carcinogenesis with Azo Compounds," *Cancer Research*, 7:333–341, 1947.

9. Kirby, A.H.M. and P.R. Peacock, "The Induction of Liver Tumors by 4-Aminoazobenzene and its N,N-Dimethyl Derivative in Rats on a Restricted Diet," *Journal of Pathology and Bacteriology*, 59:1–18, 1947.

10. Fare, G., "Rat Skin Carcinogenesis by Topical Applications of Some Azo Dyes," *Cancer Research*, 26:2406–2408, 1966.

11. Memorandum, Quantitative Risk Assessment Committee, "Report of the Committee on 4-Aminoazobenzene (Dietary and Skin Exposures)," December 20, 1983.

12. Block, N.L., et al., "The Initiation, Progress and Diagnosis of Dog Bladder Cancer Induced by 4-Aminobiphenyl," *Investigative Urology*, 16:50–54, 1978.

13. Rippe, D.F., et al., "Urinary Bladder Carcinogenesis in the Dog: Preliminary Studies on Cellular Immunity," *Transplantation Proceedings*, 7:495–501, 1975.

14. Memorandum, Quantitative Risk Assessment Committee, "Report of the Committee on 4-Aminobiphenyl," December 20, 1983.

15. Druckrey, H., "Quantitative Aspects in Chemical Carcinogenesis," U.I.C.C. Monograph Series, 7:60–78, 1967.

16. National Cancer Institute, "Bioassay of Aniline Hydrochloride for Possible Carcinogenicity," NCI Technical Report No. 130, NCI–CG–TR–130, U.S. Department of Health, Education, and Welfare, Public Health Service, National Institutes of Health, 1978.

17. Chemical Industry Institute of Toxicology, Research Triangle Park, NC, "104 Week Chronic Toxicity Study in Rats: Aniline Hydrochloride," Final Report, January 4, 1982.

18. Memorandum, Quantitative Risk Assessment Committee, "Committee Report on Aniline," December 20, 1983.

19. National Cancer Institute, "Bioassay of Azobenzene for Possible Carcinogenicity," NCI Technical Report No. 154, NCI–CG–TR–154, U.S. Department of Health, Education, and Welfare, Public Health Service, National Institutes of Health, 1979.

20. Memorandum, Quantitative Risk Assessment Committee, "Committee Report on Azobenzene," December 20, 1983.

21. Zavon, M.R., et al., "Benzidine Exposure as a Cause of Bladder Tumors," *Archives of Environmental Health*, 27:1–7, 1973.

22. Rinde, E., and W. Troll, "Metabolic Reduction of Benzidine Azo Dyes to Benzidine in the Rhesus Monkey," *Journal of the National Cancer Institute*, 55: 181–182, 1975.

23. Memorandum, Quantitative Risk Assessment Committee, "Committee Report on Benzidine," December 20, 1983.

24. Otsuka, I., "Uber die Experimentelle Papillomerzeugung im Vormagen der Mausen durch Diazoaminobenzol," *Gann*, 29:209–214, 1935.

25. Memorandum, Quantitative Risk Assessment Committee, "Committee Report on 1,3-Diphenyltriazene (Dietary and Dermal Exposures)," December 20, 1983.

26. Kirby, A.H.M., "Further Experiments in Mice With p-Diazoaminobenzene," *British Journal of Cancer*, 2:290–294, 1948.

VI. Conclusions

The agency concludes that D&C Red No. 33 is safe under the conditions of use set forth below for general use in drugs and cosmetics, and that certification is necessary for the protection of the public health. In reaching this conclusion, the agency evaluated a full battery of animal feeding and dermal studies adequate to demonstrate the safety of a color additive. The agency also performed a comparative evaluation on the splenic toxicity of D&C Red No. 33 and D&C Red No. 9 to determine whether additional animal safety testing was needed to achieve a reasonable certainty that no harm would result from use of D&C Red No. 33. Based on all the relevant data, including the comparative splenic toxicity evaluation, the agency concludes that there is a reasonable certainty of no harm from use of the additive and that further testing is unnecessary and of no benefit to the public health.

The final toxicity study reports, interim reports, and the agency's evaluations of these studies are on file at the Dockets Management Branch (address above) and may be reviewed there between 9 a.m. and 4 p.m., Monday through Friday.

The agency concludes that it is necessary to have limitations on the levels of D&C Red No. 33 that may be used in drugs and cosmetics to assure safe use.

The petitioners have not submitted the required data for eye-area use. Therefore, FDA now considers that portion of the petition that included the permanent listing of D&C Red No. 33 for eye-area use to be withdrawn without prejudice in accordance with the provisions of § 71.4 (21 CFR 71.4). Use of D&C Red No. 33 in the area of the eye has never been covered by provisional listing. The agencys listing of a color additive for general use in drugs and cosmetics does not encompass eye-area use.

The agency is describing the color additive in this regulation according to the current Chemical Abstracts nomenclature, which differs somewhat from the nomenclature FDA previously used.

The agency concludes that it is necessary to include in the listing regulations for D&C Red No. 33 a brief description of its manufacturing process to ensure the safety of the color additive. FDA has included that description to define as closely as possible the color additive that has been tested and shown to be safe. The agency is doing so because use of a different manufacturing process is likely to produce different impurities that have not been considered in establishing specifications for this color additive. The agency is not able at this time to set specifications that would control the presence of all such impurities. FDA is willing to consider petitions for alternative manufacturing processes, but those petitions should contain evidence that demonstrates that those processes will not produce impurities that will make use of the color additive unsafe.

The agency has contracted with the National Academy of Sciences/National Research Council (NAS/NRC) to develop appropriate specifications for color additives for use in food as part of the Food Chemical Codex. Similarly, appropriate specifications for color additives for use in drugs and cosmetics will be developed following the general guidelines used by NAS/NRC in its evaluation of color additives used in food. The agency concludes that specifying, through a general decription, the manufacturing process in the regulations for this color additive will provide an adequate assurance of safety until suitable specifications can be developed.

The agency finds that because of the presence, or possible presence, of carcinogenic impurities in the color additive, specifications for impurities are necessary to protect the public health. Therefore, specifications as listed in Table II, column 2, of this preamble are included in the regulation.

In the past, D&C lakes have been permitted to be prepared from uncertified straight color additives. The resulting lakes would subsequently be certified. However, to assure that all lakes meet the specification limits for the carcinogenic impurities and that the use of lakes remains consistent with the evaluation, the agency is establishing the requirement that all lakes of D&C Red No. 33 be prepared from certified batches of the straight color additive. Accordingly, § 82.1333 is amended to reflect this requirement.

This order does not permanently list D&C Red No. 33 lakes. FDA published a notice of intent in the **Federal Register** of June 22, 1979 (44 FR 36411), which discussed the additional information that the agency believes is needed before final regulations on lakes can be issued. FDA intends to publish proposed regulations governing the use of color additives in lakes in the **Federal Register** in the near future and concludes that the listing of color additives for use in lakes can best be implemented by general regulations. D&C Red No. 33 lakes will, therefore, continue to be provisionally listed for coloring drugs and cosmetics under Parts 81 and 82 (21 CFR Parts 81 and 82).

The agency has determined under 21 CFR 25.24(b)(3) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VII. Objections

Any person who will be adversely affected by this regulation may at any time on or before September 29, 1988, file with the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects

21 CFR Part 74

Color additives, Cosmetics, Drugs.

21 CFR Part 81

Color additives, Cosmetics, Drugs.

21 CFR Part 82

Color additives, Cosmetics, Drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Parts 74, 81, and 82 are amended as follows:

PART 74—LISTING OF COLOR ADDITIVES SUBJECT TO CERTIFICATION

1. The authority citation for 21 CFR Part 74 continues to read as follows:

Authority: Secs. 701, 706, 52 Stat. 1055–1056 as amended, 74 Stat. 399–407 as amended (21 U.S.C. 371, 376); 21 CFR 5.10.

2. Section 74.1333 is added to Subpart B to read as follows:

§ 74.1333 D&C Red No. 33.

(a) *Identity.* (1) The color additive D&C Red No. 33 is principally the disodium salt of 5-amino-4-hydroxy-3-(phenylazo)-2,7-naphthalenedisulfonic acid (CAS Reg. No. 3567–66–6). To manufacture the additive, the product obtained from the nitrous acid diazotization of aniline is coupled with 4-hydroxy-5-amino-2,7-naphthalenedisulfonic acid in an alkaline aqueous medium. The color additive is isolated as the sodium salt.

(2) Color additive mixtures for drug use made with D&C Red No. 33 may contain only those diluents that are suitable and that are listed in Part 73 of this chapter as safe for use in color additive mixtures for coloring drugs.

(b) *Specifications.* D&C Red No. 33 shall conform to the following specifications and shall be free from impurities other than those named to the extent that such impurities may be avoided by current good manufacturing practices:

Sum of volatile matter at 135 °C (275 °F) and chlorides and sulfates (calculated as sodium salts), not more than 18 percent.
Water-insoluble matter, not more than 0.3 percent.
4-Amino-5-hydroxy-2,7-naphthalenedisulfonic acid, disodium salt, not more than 0.3 percent.
4,5-Dihydroxy-3-(phenylazo)-2,7-naphthalenedisulfonic acid, disodium salt, not more than 3.0 percent.
Aniline, not more than 25 parts per million.
4-Aminoazobenzene, not more than 100 parts per billion.
1,3-diphenyltriazene, not more than 125 parts per billion.
4-Aminobiphenyl, not more than 275 parts per billion.
Azobenzene, not more than 1 part per million.
Benzidine, not more than 20 parts per billion.
Lead (as Pb), not more than 20 parts per million.
Arsenic (as As), not more than 3 parts per million.
Mercury (as Hg), not more than 1 part per million.
Total color, not less than 82 percent.

(c) *Uses and restrictions.* The color additive D&C Red. No 33 may be safely used for coloring ingested drugs, other than mouthwashes and dentifrices, in amounts not to exceed 0.75 milligram per daily dose of the drug. D&C Red No. 33 may be safely used for coloring externally applied drugs, mouthwashes, and dentifrices in amounts consistent with current good manufacturing practice.

(d) *Labeling requirements.* The label of the color additive and any mixtures prepared therefrom intended solely or in part for coloring purposes shall conform to the requirements of § 70.25 of this chapter.

(e) *Certification.* All batches of D&C Red No. 33 shall be certified in accordance with regulations in Part 80 of this chapter.

3. Section 74.2333 is added to Subpart C to read as follows:

§ 74.2333 D&C Red No. 33.

(a) *Identity and specifications.* The color additive D&C Red No. 33 shall conform in identity and specifications to the requirements of § 74.1333(a) (1) and (b).

(b) *Uses and restrictions.* The color additive D&C Red No. 33 may be safely used for coloring cosmetic lip products in amounts not to exceed 3 percent total color by weight of the finished cosmetic products. D&C Red No. 33 may be safely used for coloring mouthwashes (including breath fresheners), dentifrices, and externally applied cosmetics in amounts consistent with current good manufacturing practice.

(c) *Labeling requirements.* The label of the color additive and any mixtures prepared therefrom intended solely or in part for coloring purposes shall conform to the requirements of § 70.25 of this chapter.

(d) *Certification.* All batches of D&C Red No. 33 shall be certified in accordance with regulations in Part 80 of this chapter.

PART 81—GENERAL SPECIFICATIONS AND GENERAL RESTRICTIONS FOR PROVISIONAL COLOR ADDITIVES FOR USE IN FOODS, DRUGS, AND COSMETICS

4. The authority citation for 21 CFR Part 81 continues to read as folows:

Authority: Secs. 701, 706, 52 Stat. 1055–1056 as amended, 74 Stat. 399–407 as amended (21 U.S.C. 371, 376); Title II, Pub. L. 86–618, sec. 203, 74 Stat. 404–407 (21 U.S.C. 376, note); 21 CFR 5.10.

§ 81.1 [Amended]

5. Section 81.1 *Provisional lists of color additives* is amended by removing the entry for "D&C Red. No. 33" from the table in paragraph (b).

§ 81.25 [Removed]

6. Section 81.25 *Temporary tolerances* is removed.

§ 81.27 [Amended]

7. Section 81.27 *Conditions of provisional listing* is amended by removing the entry for "D&C Red. No. 33" from the table in the introductory text of paragraph (d).

PART 82—LISTING OF CERTIFIED PROVISIONALLY LISTED COLORS AND SPECIFICATIONS

8. The authority citation for 21 CFR Part 82 continues to read as follows:

Authority: Secs. 701, 706, 52 Stat. 1055–1056 as amended, 74 Stat. 399–407 as amended (21 U.S.C. 371, 376); 21 CFR 5.10.

9. Section 82.1333 is revised to read as follows:

§ 82.1333 D&C Red No. 33.

(a) The color additive D&C Red. No. 33 shall conform in identity and specifications to the requirements of § 74.1333(a) (1) and (b) of this chapter.

(b) All lakes of D&C Red. No. 33 shall be manufactured from previously certified batches of the straight color additive.

Dated: August 23, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88–19541 Filed 8–29–88; 8:45 am]

BILLING CODE 4160-01-M

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21 CFR Part 314

[Docket No. 82N-0293]

Technical Revision in Regulations Governing Drug Master File Submissions

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is making a minor revision of the rules governing the submission to FDA of Drug Master Files (DMF's). DMF's are reference files submitted to FDA generally in support of investigational and marketing applications for human drugs. The final rule reduces from three to two the number of copies of a DMF required to be submitted. This change will eliminate the submission of unneeded material and will reduce the volume of submissions.

DATES: Effective September 29, 1988; comments by October 31, 1988.

ADDRESS: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Adele S. Seifried, Center for Drug Evaluation and Research (HFD-362), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8046.

SUPPLEMENTARY INFORMATION: DMF's are reference files submitted to FDA that generally are used in the review of investigational and marketing applications for human drugs. DMF's are often submitted to the agency to allow another party to reference this material without disclosing to that party the contents of the file. In the **Federal Register** of February 22, 1985 (50 FR 7452 at 7493), FDA adopted new regulations governing the submission and content of DMF's. The agency is now making a minor change in these requirements.

The current regulation requires that DMF's be submitted in triplicate (21 CFR 314.420(c)). FDA has found that two copies of the drug master file are adequate and has revised the regulation accordingly.

This revision is consistent with the guidance provided in the "Draft Guideline for Drug Master Files" made available under a notice published in the **Federal Register** of October 15, 1987 (52 FR 38276).

Notice and comment procedure is not necessary before issuing this technical revision (5 U.S.C. 553(b)(B); 21 CFR 10.40(e)(1)). This regulation does not impose any new requirements but merely makes a minor technical revision of the DMF regulations already in place. This revision is intended to assist both DMF submitters and FDA by eliminating submission of an unneeded copy. No useful purpose would be served by notice and comment. The Commissioner has therefore determined for good cause that notice and comment are unnecessary and contrary to the public interest.

This technical revision becomes effective on September 29, 1988. However, interested persons may, on or before October 31, 1988, submit written comments to the Dockets Management Branch (address above). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Such comments will be considered in determining whether amendments, modifications, or revisions to the final rule are warranted. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Environmental Impact

The agency has determined under 21 CFR 25.24(a)(9) that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Economic Impact

In accordance with Executive Order 12291 and the Regulatory Flexibility Act (Pub. L. 96–354), the agency has carefully analyzed the economic consequences of this final rule. This final rule is merely a technical revision of an existing rule which will have minor but beneficial economic consequences, and the agency has determined that it is, therefore, not a major rule as defined in Executive Order 12291. Further, the Commissioner certifies that this clarification will not have a significant impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act.

Paperwork Reduction Act

The minor technical changes under this rule relate to collection of information requirements already submitted to the Office of Management and Budget (OME) under section 3507 of the Paperwork Reduction Act of 1980 and previously approved under OMB control number 0910–0001.

List of Subjects in 21 CFR Part 314

Administrative practice and procedure, Drugs, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act, 21 CFR Chapter I, Part 314 is amended as follows:

PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG OR AN ANTIBIOTIC DRUG

1. The authority citation for 21 CFR Part 314 continues to read as follows:

Authority: Secs. 501, 502, 503, 505, 506, 507, 701, 52 Stat. 1049–1053 as amended, 1055–1056 as amended, 55 Stat. 851, 59 Stat. 463 as amended (21 U.S.C. 351, 352, 353, 355, 356, 357, 371); 21 CFR 5.10, 5.11.

§ 314.420 [Amended]

2. Section 314.420 *Drug master files* is amended in paragraph (c) in the first and fourth sentences by revising the word "three" to read "two".

Dated: August 24, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88–19682 Filed 8–29–88; 8:45 am]

BILLING CODE 4160-01-M

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21 CFR Part 81

[Docket No. 76N–0366]

Provisional Listing of FD&C Red No. 3, D&C Red No. 33, and D&C Red No. 36; Postponement of Closing Date

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is postponing the closing date for the provisional listings of FD&C Red No. 3 for use in coloring cosmetics and externally applied drugs; of the lakes of FD&C Red No. 3 for use in coloring food, drugs, and cosmetics; and of D&C Red No. 33 and D&C Red No. 36 for use as color additives in drugs and cosmetics. The new closing date for the provisional listing of these color additives will be October 28, 1988. FDA has decided that this postponement is necessary to provide time for the receipt and evaluation of any objections and comments submitted in response to two final rules and a proposal published in the **Federal Register** concerning these color additives.

EFFECTIVE DATE: August 30, 1988. The new closing date for FD&C Red No. 3 and its lakes, D&C Red No. 33, and D&C Red No. 36 will be October 28, 1988.

FOR FURTHER INFORMATION CONTACT: Gerad L. McCowin, Center for Food Safety and Applied Nutrition (HFF–330), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–472–5676.

SUPPLEMENTARY INFORMATION: FDA has established the current closing date of August 30, 1988, for the provisional listing of FD&C Red No. 3, D&C Red No. 33, and D&C Red No. 36 by a regulation published in the **Federal Register** of July 1, 1988 (53 FR 25127). In the **Federal Register** of August 2, 1988 (53 FR 29024), FDA permanently listed the drug and cosmetic use of D&C Red No. 36. Elsewhere in this issue of the **Federal Register**, FDA is permanently listing the drug and cosmetic uses of D&C Red No. 33 and proposing to postpone the closing date for the provisional listing of the cosmetic and external drug uses of FD&C Red No. 3 and of the use of FD&C Red No. 3 lakes in coloring food, drugs, and cosmetics. The regulation set forth below will postpone the August 30, 1988, closing date for the provisional listing of these color additives until October 28, 1988.

The two final rules referred to above provide 30 days for any person who will be adversely affected by these rules to file written objections. The proposal provides 30 days for the submission of comments by interested persons. The postponement of the closing dates for the provisional listing of these color additives for 60 days will provide time for receipt and evaluation of, and appropriate agency action to, objections or requests for a hearing submitted in response to the final rules and comments on the proposed rule.

FDA believes that it is reasonable to postpone the closing date for these color additives until October 28, 1988, to provide a short period of time for its receipt and evaluation of any comments or objections and subsequent agency action. FDA concludes that this extension is consistent with the public health and the standards set forth for continuation of provisional listing in *McIlwain* v. *Hayes*, 690 F.2d 1041 DC Cir. 1982).

Because of the shortness of time until August 30, 1988, closing date, FDA concludes that notice and public procedure on this regulation are impracticable and that good cause exists for issuing the postponement as a final rule and for an effective date of August 30, 1988. This regulation will permit the uninterrupted use of these color additives until further action is taken. In accordance with 5 U.S.C. 553(b), (d)(1), and (d)(3), this postponement is issued as a final regulation, effective August 30, 1988.

List of Subject in 21 CFR Part 81

Color additives, Cosmetics, Drugs.

Therefore, under the Transitional Provisions of the Color Additive Amendments of 1960 to the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 81 is amended as follows:

PART 81—GENERAL SPECIFICATIONS AND GENERAL RESTRICTIONS FOR PROVISIONAL COLOR ADDITIVES FOR USE IN FOODS, DRUGS, AND COSMETICS

1. The authority citation for 21 CFR Part 81 continues to read as follows:

Authority: Secs. 701, 706, 52 Stat. 1055–1056 as amended, 74 Stat. 399–407 as amended (21 U.S.C. 371, 376); Title II, Pub. L. 86–618; sec. 203, 74 Stat. 404–407 (21 U.S.C. 376, note); 21 CFR 5.10

§ 81.1 [Amended]

2. Section 81.1 *Provisional lists of color additives* is amended in the tables of paragraph (a) for the entry "FD&C Red No. 3" and of paragraph (b) for the entries "D&C Red No. 33" and "D&C Red No. 36" by revising the closing date to read "October 28, 1988".

§ 81.27 [Amended]

3. Section 81.27 *Conditions of provisional listing* is amended in the table, appearing in the introductory text in paragraph (d), by revising the closing dates for the entries "FD&C Red No. 3", "D&C Red No. 33", and "D&C Red No. 36" to read "October 28, 1988."

Dated: August 24, 1988.

John M. Taylor

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88–19681 Filed 8–29–88; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 85

[DoD Directive 1010.10]

Health Promotion

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This Departmental health promotion Part emphasizes education about health risks associated with smoking, use of drugs and alcohol, diet, lack of exercise, and high blood pressure. It aims at creating an atmosphere that supports smoking prevention and cessation, discourages tobacco use and restricts smoking in Department buildings and facilities, and creates a healthy work environment.

EFFECTIVE DATE: July 18, 1988.

FOR FURTHER INFORMATION CONTACT: Colonel Hagey, Office of the Secretary of Defense (Health Affairs) (PA&QA), Room 3D368, the Pentagon, Washington, DC 20301, telephone (202) 695-6800.

SUPPLEMENTARY INFORMATION: .

List of Subjects in 32 CFR Part 85

Federal buildings and facilities, Smoking.

Accordingly, Title 32, Chapter I, is amended by adding Part 85 as follows:

PART 85—HEALTH PROMOTION

Sec.
85.1 Purpose.
85.2 Applicability and scope.
85.3 Definitions.
85.4 Policy.
85.5 Responsibilities.
85.6 Procedures.

Authority: 5 U.S.C. 301.

§ 85.1 Purpose.

(a) This Part establishes a health promotion policy within the Department of Defense to improve and maintain military readiness and the quality of life of DoD personnel and other beneficiaries.

(b) This Part replaces 32 CFR Part 203 and establishes policy on smoking in DoD occupied buildings and facilities.

§ 85.2 Applicability and scope.

(a) This Part applies to the Office of the Secretary of Defense (OSD), the Military Departments, and the Defense Agencies.

(b) It is directed to all military personnel and retirees, their families, and, where specified, to civilian employees.

§ 85.3 Definitions.

Health Promotion. Any combination of health education and related organizational, social, economic or health care interventions designed to facilitate behavioral and environmental alterations that will improve or protect health. It includes those activities intended to support and influence individuals in managing their own health through lifestyle decisions and selfcare. Operationally, health promotion includes smoking prevention and cessation, physical fitness, nutrition, stress management, alcohol and drug abuse prevention, and early identification of hypertension.

Lifestyle. The aggregated habits and behaviors of individuals.

Military Personnel. Includes all U.S. military personnel on active duty, U.S. National Guard or Reserve personnel on active duty, and Military Service Academy cadets and midshipmen.

Self-Care. Includes acceptance of responsibility for maintaining personal health, and decisions concerning medical care that are appropriate for the individual to make.

Target Populations. Military personnel, retirees, their families, and civilian employees.

§ 85.4 Policy.

It is DoD policy to:

(a) Encourage military personnel, retirees, their families and civilian employees to live healthy lives through an integrated, coordinated and comprehensive health promotion program.

(b) Foster an environment that enhances the development of healthful lifestyles and high unit performance.

(c) Recognize the right of individuals working or visiting in DoD occupied buildings to an environment reasonably free of contaminants.

(d) Disallow DoD Components' participation with manufacturers or distributors of alcohol or tobacco products in promotional programs, activities, or contests aimed primarily at DoD personnel. This does not prevent accepting support from these manufacturers or distributors for worthwhile programs benefiting military personnel when no advertised cooperation between the Department of Defense and the manufacturer or distributor directly or indirectly identifying an alcohol or tobacco product with the program is required. Neither does it prevent the participation of military personnel in programs, activities, or contests approved by the manufacturers or distributors of such products when that participation is incidental to general public participation.

§ 85.5 Responsibilities.

(a) The *Assistant Secretary of Defense (Health Affairs)* (ASD(HA)) shall coordinate and monitor the DoD health promotion program in accordance with this Part, executing this responsibility in cooperation with the Assistant Secretary of Defense (Force Management and Personnel) and the Assistant Secretary of Defense (Reserve Affairs). The Office of the Assistant Secretary of Defense (Health Affairs) (ASD(HA)) shall:

(1) Establish and chair the Health Promotion Coordinating Committee comprised of representatives of the Office of the Assistant Secretary of Defense (Force Management and Personnel) (OASD(FM&P)), Office of the Assistant Secretary of Defense (Acquisition and Logistics) (OASD(A&L)), the Office of the Assistant Secretary of Defense (Reserve Affairs) (OASD(RA)), each Military Service, and such other advisors as the OASD(HA) considers appropriate.

(2) Facilitate exchanges of technical information and problem solving within and among Military Services and Defense Agencies.

(3) Provide technical assistant, guidance and consultation.

(4) Coordinate health data collection efforts to ensure standardization and facilitate joint studies across DoD components.

(5) Review dietary standards for DoD dining facilities as specified in DoD Directive 3235.2 [1]

(b) The *Assistant Secretary of Defense (Force Management and Personnel)* (ASD(FM&P)) shall, in collaboration with the ASD(HA), coordinate and monitor relevant aspects of the health promotion program. These include:

(1) Use of tobacco products in DoD occupied facilities.

(2) Operation of health promotion and screening programs at the worksite and in Professional Military Education, DoD Dependents Schools, and Section 6 schools.

(3) Dietary regulation of DoD snack concessions, and vending machines.

(4) Reduction of stress in work setting.

(5) Designate two representatives to the Health Promotion Coordinating Committee.

(c) The *Assistant Secretary of Defense (Reserve Affairs)* (OASD(RA)) shall:

(1) Coordinate and monitor relevant aspects of the health promotion program as it pertains to National Guard and Reserve Personnel.

(2) Designate a representative to the Health Promotion Coordinating Committee.

(d) The *Secretaries of the Military Departments* shall:

(1) Develop a comprehensive health promotion program plan for their respective Service(s).

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[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, Attn: Code 1062, 5801 Tabor Avenue, Philadelphia, PA 19120.

(2) Establish and operate an integrated, coordinated and comprehensive health promotion program as prescribed by this Directive.

(3) Designate from their respective Service(s) a health promotion coordinator who shall also serve as representative to the Health Promotion Coordinating Committee.

(4) Evaluate the effectiveness of their respective health promotion program(s).

(e) The *Directors of Defense Agencies* shall develop and implement health promotion plans and programs for their civilian employees in accordance with this part.

(f) The *Assistant Secretary of Defense (Comptroller)* (ASD(C)) shall develop and implement a health program promotion for OSD civilian employees.

§ 85.6 Procedures.

(a) Each Military Service shall establish a health promotion program coordinator to serve as the focal point for all health promotion program issues and to integrate the activities of the medical and personnel departments.

(b) A Health Promotion Coordinating Committee shall be established to enhance communication among the Military Services, recommend joint policy and program actions, review program implementation, and recommend methodologies and procedures for program evaluation. The Committee shall be chaired by the Assistant Secretary of Defense (Health Affairs) (ASD(HA)) or designee. Additional members shall include two representatives from the Office of the Assistant Secretary of Defense (Force Management and Personnel); one representative from the Office of the Assistant Secretary of Defense (Reserve Affairs); one representative from the office of the Assistant Secretary of Defense (Acquisition & Logistics); and the health promotion coordinator from each Military Service.

(c) Each Component shall prepare a plan for the implementation of a comprehensive health promotion program that includes specific objectives (planned accomplishments) with measurable action steps. The plan shall address all of the program elements identified in the definition of health promotion for each group in the target populations. The plan shall consider workload, systems support, and training needs of individuals charged with responsibility at all organizational levels.

(d) Health promotion plans and programs shall address smoking prevention and cessation, physical fitness, nutrition, stress management, alcohol and drug abuse, and early identification of hypertension.

(1) Smoking prevention and cessation programs shall aim to create a social environment that supports abstinence and discourage use of tobacco products, create a healthy working environment, and provide smokers with encouragement and professional assistance in quitting. In addition to these aims, smoking prevention and cessation programs shall include the following elements.

(i) Smoking shall be permitted in buildings only to the extent that it does not endanger the life or property, or risk impairing nonsmokers' health.

(ii) The smoking of tobacco products within DoD occupied space shall be controlled in accordance with the following guidelines:

(A) Smoking shall be prohibited in auditoriums, conference rooms and classrooms. No Smoking signs shall be prominently displayed, and ashtrays shall not be permitted. Receptacles may be placed at entrances so that visitors may dispose of lighted smoking material when entering a nonsmoking area.

(B) Nonsmoking areas shall be designated and posted in all eating facilities in DoD occupied buildings. Smoking areas shall be permitted only if adequate space is available for nonsmoking patrons and ventilation is adequate to provide them a healthy environment.

(C) Elevators shall be designated as nonsmoking areas.

(D) Smoking shall be prohibited in official buses and vans.

(E) Within the confines of medical treatment facilities, smoking shall be restricted to private offices and specially designated areas. Smoking by patients shall be limited to specially designated areas, and health care providers shall not smoke in the presence of patients while performing their duties. Smoking is permitted in visitor waiting areas only where space and ventilation capacities permit division into smoking and nonsmoking sections.

(F) Smoking shall not be permitted in common work areas shared by smokers and nonsmokers unless adequate space is available for nonsmokers and ventilation is adequate to provide them a healthy environment. Where feasible, smoking preference should be considered when planning individual work stations so that smoking and nonsmoking areas may be established.

(G) When individual living quarters are not available and two or more individuals are assigned to one room, smoking and nonsmoking preferences shall be considered in the assignment of rooms.

(H) Smoking by students attending DoD Dependents Schools or Section 6 schools shall not be permitted on school grounds except as provided by policy regulations promulgated by the Director, DoDDS. Faculty and staff shall smoke only in specifically designated areas and shall not smoke in the presence of students.

(iii) Installations shall assess the current resources, referral mechanisms, and need for additional smoking cessation programs. Occupational health clinics shall consider the feasibility of smoking cessation programs for civilian employees or, at a minimum, be able to refer employees to such programs. While smoking cessation should be encouraged, care shall be taken to avoid coercion or pressure on employees to enter smoking cessation programs against their will. Smoking prevention programs shall be made available in DoD Dependents Schools and Section 6 schools.

(iv) Information on the health consequences of smoking shall be incorporated with the information on alcohol and drug abuse provided to military personnel at initial entry and at permanent change of station as specified in 32 CFR Part 62a. At initial entry, nonsmokers shall be encouraged to refrain from smoking. Smokers shall be encouraged to quit and be offered assistance in quitting.

(v) As part of routine physical and dental examinations and at other appropriate times, health care providers should be encouraged to inquire about the patient's tobacco use, including use of smokeless tobacco products; to advise him or her of the risks associated with use, the health benefits of abstinence, and of where to obtain help to quit.

(vi) Appropriate DoD health care providers should advise all pregnant smokers of the risks to the fetus.

(vii) The Military Services shall conduct public education programs appropriate to various target audiences on the negative health consequences of smoking.

(2) Physical fitness programs shall aim to encourage and assist all target populations to establish and maintain the physical stamina and cardiorespiratory endurance necessary for better health and a more productive lifestyle. In addition to the provisions of DoD Directive 1308.1 [2] and Secretary of

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[2] See footnote 1 to § 85.5(a)(5).

Defense Memorandum physical fitness programs shall include the following elements.

(i) Health professionals shall consider exercise programs conducive to improved health, and encourage appropriate use by patients. For military personnel, recommendations shall accord with military readiness requirements.

(ii) Commanders and managers should assess the availability of fitness programs at or near work sites and should consider integrating fitness regimens into normal work routines for military personnel as operational commitments allow.

(iii) The chain of command should encourage and support community activities that develop and promote fitness among all target populations. Activities should be designed to encourage the active participation of many people rather than competition among a highly motivated few.

(3) Nutrition programs shall aim to encourage and assist all target populations to establish and maintain dietary habits contributing to good health, disease prevention, and weight control. Weight control involves both nutrition and exercise, and is addressed in part in DoD Directive 1308.1. Nutrition programs include efforts not only to help individuals develop appropriate dietary habits, but also to modify the environment so that it encourages and supports appropriate habits. Additionally, nutrition programs shall include the following elements.

(i) Nutritional advice and assistance shall be provided by appropriate DoD health care professionals to military personnel, retirees, and family members.

(ii) In military and civilian dining facilities, where feasible, calorie information and meals with reduced amounts of fat, salt, and calories shall be made readily available.

(iii) Snack concessions and vending machines, when feasible, shall offer nutritious alternatives, such as fresh fruit, fruit juices, and whole grain products.

(iv) Public information campaigns shall be conducted by the Military Services to alert all target populations about the relationship between diet and risk of chronic diseases.

(4) Stress management programs shall aim to reduce environmental stressors and help target populations cope with stress. Additionally, stress management programs shall include the following elements.

(i) Commanders should develop leadership practices, work policies and procedures, and physical settings that promote productivity and health for military personnel and civilian employees.

(ii) Health and fitness professionals are encouraged to advise target groups on scientifically supported stress management techniques.

(iii) The topic of stress management should be considered for integration into the curricula at appropriate Professional Military Education programs and in the DoD Dependents Schools and Section 6 schools to familiarize students with scientifically supported concepts of stress management for day-to-day problems, life transitions, and life crises.

(5) Alcohol and drug abuse prevention programs shall aim to prevent the misuse of alcohol and other drugs, eliminate the illegal use of such substances, and provide counseling or rehabilitation to abusers who desire assistance in accordance with the provisions of 32 CFR Parts 62a and 62 and DoD Instruction 1010.6 [3] Additionally, alcohol and drug abuse prevention programs shall include the following elements.

(i) Appropriate DoD health care professionals shall advise all pregnant patients and patients contemplating pregnancy about the risks associated with the use of alcohol and other drugs during pregnancy.

(ii) The Military Services shall conduct public education programs appropriate to various target audiences. Programs should include such topics as alcohol and drug use and pregnancy, driving while intoxicated, and adolescent alcohol and drug abuse.

(6) Hypertension prevention programs shall aim to identify hypertension early, provide information regarding control and lifestyle factors, and provide treatment referral where indicated. Early identification of hypertension programs shall include the following elements.

(i) Hypertension screening shall be provided as part of all medical examinations and the annual dental examination for active duty service members. Screening shall also be provided to other beneficiaries, excluding those in the Children's Preventive Dentistry Program, at the time of their original request for care. Patients with abnormal screening results shall receive appropriate medical referrals.

(ii) Each DoD medical facility should periodically offer mass hypertension screening to encourage beneficiaries to monitor their blood pressure regularly.

(iii) Occupational health clinics shall make hypertension screening readily available to civilian employees, and shall encourage employees to use this service.

(iv) Public information campaigns emphasizing the dangers of hypertension and the importance of periodic hypertension screening and dietary regulation shall be conducted.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

August 24, 1988.

[FR Doc. 88-19567 Filed 8-29-88; 8:45 am]

BILLING CODE 3810-01-M

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[3] See footnote 1 to § 85.5(a)(5).

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD8-88-16]

Special Local Regulations; Fireworks Display, Morgan City, LA

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: Special local regulations are being adopted for The Fireworks Display. This event will be held on 4 September 1988 from 9:00 p.m. until 11:00 p.m. on Berwick Bay in the Atchafalaya River at Morgan City. These regulations are needed to provide for the safety of life on navigable waters during the event.

EFFECTIVE DATES: These regulations become effective on 4 September 1988 at 8:30 p.m. and terminate on 4 September 1988 at 11:30 p.m.

FOR FURTHER INFORMATION CONTACT: CWO William G. Whitehouse, Eighth U.S. Coast Guard District, Tel: (504) 589-2972.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published. Following normal rulemaking procedures would have been impracticable. The details of the event were not finalized until 17 August 1988 and there was not sufficient time remaining to publish proposed rules in advance of the event or to provide for a delayed effective date.

Nevertheless, interested persons wishing to comment may do so by submitting written views, data or arguments. Comments should include their name and address, identify this notice (CGD8-88-16) and the specific section of the proposal to which the comments apply, and give reasons for each comment. Receipt of comments will be acknowledged if a stamped selfaddressed envelope is enclosed. The regulations may change in light of comments received.

Drafting Information

The drafters of this regulation are CWO William G. Whitehouse, Project Officer, Eighth Coast Guard District, New Orleans, LA, and CDR J.A. Unzicker, Project Attorney, Eighth Coast Guard District Legal Office.

Discussion of Regulations

The marine event requiring this regulation is a Fireworks Display called "The Fireworks Display." This event is sponsored by the Louisiana Shrimp and Petroleum Festival and Fair Association, Inc. It will consist of 1 tugboat with 1 or 2 barges for the launching of fireworks. Approximately 25–30 spectator boats are expected for the event. While viewing the event at any point outside the regulated area is not prohibited, spectators will be encouraged to congregate within areas designated by the sponsor.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

Regulations

In consideration of the foregoing, Part 100 of Title 33, Code of Federal Regulations, is amended as follows:

PART 100—[AMENDED]

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35.

2. A temporary section 100.35-8-88-16 is added to read as follows:

§ 100.35-8-88-16 Berwick Bay, Atchafalaya River, Louisiana

(a) *Regulated area:* The following area will be closed to all vessel traffic: Berwick Bay from the junction of the Lower Atchafalaya River and Bayou Boeuf at Morgan City, LA to the Highway 90 Bridge.

(b) *Special local regulations:* All persons and/or vessels not registered with the sponsors as participants or official patrol vessels are considered spectators. The "official patrol" consists of any Coast Guard, public, state or local law enforcement and/or sponsor provided vessels assigned to patrol the event.

(1) No spectator shall anchor, block, loiter or impede the through transit of participants or official patrol vessels in the regulated area during the effective dates and times, unless cleared for such entry by or through an official patrol vessel.

(2) When hailed and/or signaled, by an official patrol vessel, a spectator shall come to an immediate stop. Vessels shall comply with all directions given; failure to do so may result in a citation.

(3) The Patrol Commander is empowered to forbid and control the movement of all vessels in the regulated area. He may terminate the event at any time it is deemed necessary for the protection of life and/or property. He may be reached on VHF-FM Channel 16, when required, by the call sign "PATCOM."

(c) *Effective dates:* These regulations will be effective from 8:30 p.m. to 11:30 p.m. 4 September 1988.

Dated: August 18, 1988.

W.F. Merlin,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 88-19600 Filed 8-29-88; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223

Removal of National Forest Timber

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes additional standards for a Contracting Officer to use in determining whether a prospective purchaser is responsible and capable of performing a particular contract before the Government enters into a contract with that prospective purchaser. In addition, this rule requires increased downpayments from those purchasers of National Forest System timber with a recent record of failure to perform timber sale contracts but who otherwise may meet the responsibility requirements and who are determined to be responsible. These changes should improve timber sale contracting and reduce the number of unperformed and violated contracts with a corresponding reduction in negative effects on management of the National Forests.

EFFECTIVE DATE: This rule is effective September 29, 1988.

FOR FURTHER INFORMATION CONTACT: Questions about this final rule may be addressed to: Ed Whitmore, Timber Management Staff, Forest Service, USDA, P.O. Box 96090, Washington, DC 20013-6090, (202) 475-3758.

SUPPLEMENTARY INFORMATION:

Background

Since 1982 the Forest Service has witnessed a significant upsurge in the number of National Forest timber purchasers who do not complete their sale contracts. Over 1,900 timber sale contracts have been defaulted by approximately 1,300 purchasers. Under contract provisions governing default, the Government estimates it has sustained damages valued in excess of $230 million as a result of these defaults. In addition, there is potential for another estimated $200 million dollars in damages in the event of default of some high-priced sales bid prior to 1982. These sales are vulnerable to default because they were bid when the lumber market was extremely high compared to current prices. Following default, sales are reappraised and reoffered. Damages are determined by subtracting the resale value of the timber from the original bid price.

A timber sale program is designed so that every year the cumulative effects of the program are compatible with and contribute to the planned management of a National Forest. When a timber sale contract is defaulted, the harvest of that timber is delayed until the timber can be resold and cut under the resale contract. In addition to causing a tremendous administrative burden on the agency associated with the rescheduling, reappraising, and reoffering the timber for sale, the delayed harvesting of Federal timber sale contracts can adversely affect management of the natural resources of the National Forest System. A default-delayed harvest may result in adverse economic, resource, and environmental effects which are both direct and indirect, as well as cumulative. Among the major impacts are:

(1) Some timber sales are sold to remove trees for the benefit of other resources. Timber harvest can improve cover/forage ratios for wildlife, increase available water supplies, open vistas for public viewing along roadsides, improve range conditions for wildlife and livestock, or remove potentially hazardous trees in a recreation area. A default-caused delay in the harvest of such a sale will delay these benefits.

(2) Some timber harvests are timed to minimize logging damage to the remaining timber or to reduce the spread of pathogens from the overstory to the understory (for example, to reduce the spread of mistletoe). When operations are delayed, the logging may be too late to minimize damage to the remaining timber or to reduce the spread of pathogens.

(3) Some logging is planned to remove some or all of the overstory in order to maintain or increase the growth of the understory. Delays in harvesting the overstory can slow the growth of the remaining smaller trees, resulting in increase brush competition or can postpone needed precommercial thinning of the remaining timber.

(4) If a timber sale contract was planned and offered to achieve commercial thinning of the timber in the sale area, a harvest delay could delay the increased growth of the remaining timber.

(5) Other silviculture treatments such as timber stand improvement in nearby areas may be delayed because the slash in the default-delayed area was not treated when originally planned. This can result in growth losses in those stands and/or an increased cost of treating the logging debris.

(6) Sales are designed to leave a healthy residual stand of timber. Default-caused delays may mean that the planned residual stand would not meet management objectives if the sale were logged as originally designed. This can result in additional delay and expense if the sale has to be redesigned to meet the objectives.

(7) Many sales are made to salvage timber that has been damaged by fire, insects, diseases, or other causes. Such timber is often subject to rapid deterioration. Default-caused delay in the harvest of this timber can cause a significant loss in the timber's volume and value and thus a significant loss of benefits to the American public.

(8) Some sales are prepared to assist control of Forest pest epidemics. Failure to remove such timber in a timely manner can increase the damage to adjacent stands.

(9) If a timber sale default delays construction of a road, the resulting delay in access could affect management of the other resources which would be tributary to the road.

In addition to serious resource problems caused by defaults, the economies of many communities, particularly in the West, are heavily dependent upon the employment generated by the harvest and manufacture of timber from the National Forests. Timber sale defaults can interrupt the flow of timber to those communities.

Defaults may also reduce receipts to the Federal Treasury and revenue sharing payments to local counties that are based on those receipts. The public services provided by many western counties are heavily dependent on these payments. State and county Governments, which depend upon an orderly source of income from the National Forests for funding of roads and schools, are subjected to budget fluctuations when purchasers fail to perform their contracts.

Inequities among purchasers also result from timber sale defaults. Purchasers who default with the exception of delaying the payment of damages are in a stronger financial position to bid on new contracts than they would have been had they performed the defaulted contracts. An inequity exists when purchasers, who have conscientiously performed their high-priced contracts and have suffered economic losses as a result, are required to compete for new contracts against purchasers whose financial ability to bid has been enhanced as a result of their failure to perform their own high-priced contracts.

These adverse impacts are magnified when a high incidence of default occurs. This recent history of defaults and deficient performance is an unacceptable situation requiring better business practices in future sales of public timber.

In light of the upsurge in defaults of timber sale contracts and the attendant adverse effects on National Forest System management, the Department of Agriculture proposed a revision of its regulations at 36 CFR Part 223 governing the sale of timber on National Forest System lands. The proposed rule, published May 20, 1987, at 52 FR 18926, proposed additional criteria for determining a purchaser to be qualified for award of a timber sale contract as well as a requirement for increased downpayments from purchasers with a deficient performance record. Public comment was requested by June 19, 1987. That date was later extended to July 6, 1987 [52 FR 23188].

Response to Public Comments

The Forest Service received comments on the proposed rule from 40 individuals and entities. Comments came from individual timber sale purchasers, timber sale purchaser associations, attorneys, Forest Service employees, a private consulting forester, and a forester employed by another Federal agency but expressing private views. About two-thirds of the responses came from the Pacific Northwest. Eighty-five percent of the responses were from West of the 100th Meridian.

Eighty percent of the respondents supported the proposal for increased downpayments either in its entirety or with suggested modifications to strengthen it. Five precent did not support any part of the increased downpayment proposal.

About 20 percent of the respondents expressed support for the proposal to determine bidder responsibility. Most of the comments pertaining to bidder responsibility expressed a concern that either the standards were too subjective or the pre-bid qualifications should be established.

The following summarizes the major comments and suggestions received and the Department's response to these in the final rule. This final rule reflects full consideration of all comments received.

General Comments

Two respondents disagreed with the statement in the supplementary information section of the proposed rule document that default of timber sale contracts might create certain adverse environmental impacts. They maintained that the identified impacts had not occurred as a result of default-delayed harvest, and, therefore, should not be listed. The agency disagrees. The discussion in the proposed rule made clear that not all the listed effects on the environment occur from any one default but that these effects *may* occur as a result of default-delayed timber harvest. The National Forests are, in fact, experiencing these impacts either singly or in combination. Therefore, the general findings stand.

Section-by-Section Comments

Section 223.49 Downpayment.

Under the proposed rule, if a purchaser or affiliate has defaulted a Forest Service or Bureau of Land Management (BLM) timber sale contract, and the contract value of the defaulted timber sale(s) was $100,000 or more, the downpayment on the new contract, if awarded to that purchaser, would be twice the amount as that normally required. Further, the purchaser would not be able to apply funds deposited as the downpayment to other uses utnil the last timber on the sale is being harvested. Under the proposal, this provision would apply to defaults occurring 30-calendar days after the effective date of the final rule.

One respondent stated that defaults of BLM timber sales should not be considered with respect to bidders of National Forest timber while another stated that they should be included. Because the two agencies have similar timber sale programs and frequently have common purchasers, purchaser performance on a BLM sale is a valid indicator of the purchaser's likely performance on a National Forest timber sale. Therefore, consideration of defaults of BLM sales is retained in the final rule. Although performance on other Federal timber sales was considered, it is not included due to the dissimilarity of programs involved.

A few respondents expressed concern that the requirement for an additional downpayment would create unequal bidder classes, in violation of the precept of Government contracting which requires that all bidders be treated equally. This concern is not well-founded. All bidders are treated equally. Should any company choose to default a contract(s) at values exceeding the established threshold, the requirement for a double downpayment applies on new sales. In seeking competitive bids for timber sales, the Forest Service attempts to maintain a balance between protecting the public and the Government's interests and recognizing the interests of the private sector. When a company fails to perform a contract or defaults a contract, the Forest Service is obligated to protect the interests of the public and the Government. Where there are future dealings with that purchaser, this final rule provides increased security via the increased downpayment to reflect the increased risk of nonperformance by a party that has previously failed to perform in accordance with contract terms. The requirement for an increased downpayment applies equally to all purchasers with a deficient performance record as identified in the rule and does not establish two classes of purchasers.

A few respondents expressed concern that the proposed rule would not accomplish the objectives of securing performance and reducing risk to the Government. Reasons were varied and conflicting: the additional downpayment requirements might create additional defaults; the additional downpayment may create a penalty while issues are being litigated; or the additional downpayment requirement is too meager. The Forest Service does not agree with these concerns. Timber sale contracting experience indicates that stronger downpayment requirements will not create additional defaults, but instead will serve as an incentive to the orderly completion of contracts for any purchaser who intends to compete for future National Forest timber sale contracts. As to the view that the additional downpayment is too meager, the agency believes a doubling of downpayment should help meet the objective of reducing risk of nonperformance of contracts and of completion of contracts in a timely manner. Those companies who have defaulted contracts will pay no more for timber than purchasers who have not defaulted, although the purchaser with a deficient performance record will have to put more money down upfront and meet more stringent performance standards before the downpayment can be applied to other uses. The Department believes this is in accordance with sound business practices and good policy. Therefore, this final rule retains the requirement of doubling the downpayment for purchasers with a record of deficient performance.

Several respondents including two industry associations recommended removal of the 12-month stipulation, thus requiring the increased downpayment for so long as default damage claims remained unpaid. Additionally, it was suggested that the increased downpayments, including the requirement for 40 percent of bid premium, should apply without regard to average bid ratios. Because these suggestions would strengthen the protection to the Government and simplify administration of the regulation, they are adopted with the proviso remaining that the Chief may determine, prior to advertisement, that timber sales in some areas may have another downpayment rate to achieve the objectives of National Forest System management.

Therefore, the final rule will require that any purchaser or affiliate who defaults a Forest Service or BLM timber sale contract within 30 days after the effective date of this rule shall make a minimum downpayment of 20 percent of the total advertised value of the sale, plus 40 percent of the total bid premium when that purchaser is determined to be the successful bidder on a Forest Service timber sale. The final rule eliminates the reference to bid ratios in determining the additional 40 percent downpayment for overbid. All bid premiums regardless of bid ratios will be subject to the 40 percent downpayment rule once the criteria for the additional downpayment requirement have been established. The requirement of an increased downpayment on Forest Service timber sales shall continue until it is determined (1) that the Government improperly classified the contract(s) as expiring uncompleted or as terminated for cause or (2) the contract value damages claimed by the Government have been paid and corrective actions have been taken by the purchaser to avoid future deficient performance.

The respondents specifically agreed with holding the downpayment deposits until the last timber on the contract was reached with one of them further suggesting that the downpayment be held on all contracts until *after* the final timber was removed whether or not the purchaser had previously defaulted. The retention of downpayments in excess of the value of the remaining timber would be unnecessary are might the considered to be punitive in nature. The intent of the rule is to protect the Government proportionate to increased risks, to minimize defaults, and to assure the orderly completion of contracts, rather than to punish those who do default. Therefore, this final rule retains the requirement that the downpayments required under this rule will not be available for other uses until the amount of unremoved timber is equal to or less than the amount of the downpayment. This is consistent with the concept that a downpayment is intended to protect the Government and public.

A few respondents suggested that the requirements for additional downpayments should not include default of sales bid prior to 1982 when bidding was generally higher and which is resulting in more contract defaults. This suggestion has been carefully evaluated but not incorporated into the final rule. The objective of the additional downpayment is to protect the Government's interest where there is additional risk of nonperformance as indicated by past conduct. Given all of the circumstances, there is no basis to differentiate among defaulted contracts based on speculative reasons for an individual default. The additional downpayment requirement needs to apply to all contractors who default contracts of a certain amount of timber and who have outstanding damages remaining to be paid, including sales bid prior to 1982.

A few respondents offered that defaulters should not be allowed to bid on Forest Service or BLM timber sales either in perpetuity or so long as outstanding default damages remain uncollected. Adoption of this proposed change would result in de facto debarment and would deny due process and the opportunity to consider mitigating circumstances provided under the debarment and suspension procedures. Debarment regulations at 36 CFR Part 223, Subpart C will continue to guide the Forest Service Debarring Official in the determination of whether a purchaser who has failed to perform in accordance with contract terms will be excluded from bidding on or award of Forest Service timber sale contracts. Therefore, this suggestion is not adopted as part of this rulemaking.

A few respondents recommended that the requirement for additional downpayments should not include defaults that were in dispute. To adopt this recommendation would likely increase the number of defaults that are disputed or litigated in order to delay or avoid the additional downpayments. Additionally, adoption of this suggestion would undermine incentives for minimizing defaults of future sales while disputes exist. Therefore, this suggestion is not incorporated in the final rule. The requirement for additional downpayment for new sales applies until the default damage claims are resolved. Should it be determined that no contract or contracts were properly classified as expiring uncompleted or terminated for cause with a value of $100,000 or more, or it is determined that the remaining value of those terminated or expired contracts is less than $100,000, any existing contract(s) would no longer be subjected to the requirement of an additional downpayment and any remaining unobligated portion of a required extra downpayment would be refunded or credited towards existing balances on the contract requiring the extra downpayment. This has been clarified in the final rule.

One respondent suggested that the requirement for additional downpayments should recognize default situations arising from good faith efforts to complete the contract as opposed to those where little or no effort was made. This suggestion is not incorporated into the final rule since the reasons for a particular default would be difficult to determine and the results of defaulted contracts are essentially the same regardless of the reason; that is, management of the National Forest System is adversely affected. To differentiate would not address the purpose of the proposed rule: To improve purchaser responsibility and to reduce risk to the Government.

One respondent recommended that the value of unscaled timber, or value of timber not cut and removed be increased from $100,000 to $500,000 before the increased downpayment be required on new sales. Conversely, several respondents suggested that all defaulters regardless of the value of remaining timber should be subjected to the increased downpayment requirement. Should the limit be increased to $500,000, it appears that too many defaulters would not be covered by the increased downpayment requirement, and the objectives of the rulemaking would not be achieved. Under Forest Service analyses, the $100,000 threshold reflects a balance between impacts on small business concerns and increased administration of impacted contracts, on the one hand, and an appropriate point at which the Government needs additional security in the form of an increased downpayment. Whether a purchaser's default(s) fall above or below the threshold, the Contracting Officer will be required to affirmatively find that the purchaser is responsible following the guidance of 36 CFR 223.101. Therefore, the final rule retains the $100,000 level of the proposed rule.

A few respondents recommended that additional bid deposits should be imposed as an incentive to assure that contracts are signed once they are bid. One respondent suggested that failure to execute a contract once it was bid should cause the sale to be treated as a default for purposes of triggering a double downpayment. The situation of the high bidder refusing to execute the contract has not been a common occurrence up to this point in time. The agency already has established procedures for recovering damages through bid deposits when contracts are not executed after bidding. The additional standards for determining purchaser responsibility as a prerequisite to award of a timber sale, which are being incorporated in the new 36 CFR 223.101, should provide adequate incentives against refusal to execute contracts.

In response to comments, the final rule clarifies that once a higher downpayment is triggered, it applies throughout the National Forest System except in those areas where the Chief determines that another downpayment rate is necessary to achieve the management objectives of the National Forest System.

Section 223.101 Determination of purchaser responsibility.

In addition to revising downpayment requirements, the Forest Service proposed to incorporate many of the bidder responsibility standards found in the Federal Acquisition Regulations [48 CFR 9.104] into the rules governing timber sale contracts. Under the proposal, before any bidder could be awarded a Forest Service timber sale contract, the Contracting Officer would have to determine that the bidder has met all of the conditions of the sale offer and that the bidder is responsible. To be determined responsible for award of a timber sale contract, the Contracting Officer must determine that the purchaser has adequate financial resources to perform the contract or can obtain them, can perform within the contract term, has a satisfactory record of performance, has a satisfactory record of integrity and business ethics, is able to obtain necessary equipment and supplies, and is otherwise qualified and eligible to receive an award of the contract.

Although not as popular as the proposal for increased downpayments, several respondents supported the proposal for determining purchaser responsibility. In addition, a few indicated support if it were modified. Suggested modifications were to establish more specific criteria for determining tenacity, perseverance, and integrity and that the determination of responsibility should rest with an authority higher than the Contracting Officer.

The standards for determining responsibility of Government procurement contractors in the Federal Acquisition Regulations (48 CFR 9.104) have been used successfully by Contracting Officers for other than timber sale contracts for several years without establishing additional criteria. A "cookbook" approach is inappropriate. The intent is to allow sufficient flexibility to ensure that all relevant information is considered. It is believed that Forest Service timber sale Contracting Officers will be equally successful in applying these established standards.

Fiscal personnel of the agency will be available to and consulted by the Contracting Officer. If there is disagreement with the Contracting Officer's determination, the prospective purchaser may submit to the Contracting Officer additional information for reconsideration. If a prospective purchaser believes a determination on respsonbibility is without a reasonable basis, that determination may be reviewed by the General Accounting Office (4 CFR Part 21). Therefore, additional guidelines have not been added to the final rule.

A few reviewers suggested that the standards for determining purchaser responsibility presume that the prospective purchaser is not responsible until proven otherwise. The Department disagrees. The regulation implements the Department's policy that the Government should only do business with those responsibile business interests who are willing and able to operate under the terms of the contracts. Accordingly, the Contracting Officer cannot award a timber sale contract until that purchaser's responsibility has been affirmatively determined. Since the information necessary to establish responsbility can only be provided by the prospective purchaser, the burden of proof is properly placed on the prospective purchaser. It is only logical that the Contracting Officer must conclude that a prospective purchaser is not responsbile if there is no information clearly indicating responsibility.

A few respondents expressed concern that the provision for Small Business Administration (SBA) review and issuance of a Certifcate of Competency would create two classes of bidders by allowing another agency to conclusively determine whether a small business is responsbile where the Forest Service initiatlly determined they were not responsible, while providing only Forest Service review for large business. This provision would not establish a new policy. Under existing law, the Small Business Administration has authority to conclusively determine any or all elements of a small business concern's responsibility by issuing or declining to issue a Certificate of Competency (15 U.S.C. 637(b)(7)). This authority applies to the sale of Federal property as well as Government procurement. Therefore, the final rule retains this provision.

One of the respondents further suggested that the Forest Service was improperly defining the 12-month period within which it may be presumed that a purchaser is not responsible as being before the bid date rather than the award date. In light of several comments, the final rule has been clarified and revised to follow the language of the Federal Acquisition Regulations. The presumption that a purchaser is not responsible will exist where the purchaser is or recently has been seriously deficient in performance of timber sale contracts. As a general guideline, deficient performance within the last 12 months will be considered to be recent performance. Because responsibility shall be determined before *award* of each timber sale contract, it is the purchaser's performance up to that point in time that is to be considered. While current and recent performance are the best indicators of present responsibility and are the basis for the rebuttable presumption, a purchaser's entire performance record should be considered in determining whether or not the purchaser is presently responsible.

Several respondents suggested that the Forest Service should establish additional pre-bid qualifications rather than determine whether a prospective purchaser is responsible after the date of any oral auction but prior to award. The agency believes that additional pre-bid standards may help protect the Government's and timber purchasers' interests and is examining the opportunities available, including establishing more restrictive pre-bid qualifications. The Forest Service will continue to study pre-bid qualifications to complement the purchaser responsibility determinations made prior to award. Any such action would be by a separate rulemaking.

One respondent expressed concern that financial information should not be available to others, including Freedom of Information Act (FOIA) inquiries, and that Contracting Officers should be the only persons to have access to financial statements. The Forest Service will provide confidentiality to information submitted for purposes of determining responsibility to the maximum extent allowed by law. Any FOIA requests for information submitted for this purpose will be handled with full consideration of available exemptions from disclosure, particularly where disclosure of the information could reasonably be expected to cause substantial competitive harm. If, after careful agency review, the agency determines that it may be required to disclose any portion of the records, the Forest Service will notify the submitter of any records containing confidential commercial information when those records have been requested under the Freedom of Information Act and allow an opportunity for the purchaser to object to disclosure of the records. (See Executive Order 12600 of June 23, 1987, 52 FR No. 122.) Current Forest Service policy strictly limits access to the information solely to personnel who use these data on a need to know basis.

Summary of the Final Rule

This final rule has substantial support in the agency record, viewed as a whole, and full attention has been given to the comments received in preparing the final regulations.

The final rule adds additional criteria and a procedure for determining a purchaser to be qualified for award of a timber sale contract. It further implements this Department's policy established in the public interest and for the Government's protection that the Forest Service shall award timber sale contracts only to responsible business concerns and individuals. The Department believes these requirements are necessary and follow good business practices while allowing flexibility and without being unduly burdensome on either party to the proposed transaction.

When reviewing bids, a Contracting Officer shall not award a timber sale contract unless he or she is able to determine from information in his or her possession that the prospective purchaser is a responsible individual or entity. Determining responsibility requires analysis of the particular facts involving that prospective purchaser. For example, when an analysis of the purchaser's financial ability to perform all contracts in a portfolio indicates the purchaser is in financial jeopardy, award of a new sale would be withheld. The prospective purchaser's past record of performance and business dealings is also clearly a factor to be considered. Section 223.101(b)(3) will require that the purchaser have a satisfactory performance record on timber sale contracts in order to be found responsible. This is sound business practice consistent with other Government contracting.

However, because of the recent large number of defaulting purchasers, the requirement of a satisfactory performance record alone could result in numerous determinations that prospective purchasers are not responsible and that contracts should not be awarded to those prospective purchasers. Many purchasers with previously good performance records have failed to perform or to satisfactorily perform contracts in recent years. Due to the unique structure of the timber industry, there may be some districts or communities where no existing purchaser would qualify to buy additional timber under a strict application of this standard. Such a large-scale result under current circumstances would not be in the public interest for the ongoing recovery of the timber industry, for dependent communities, or for proper management of the National Forest System.

Therefore, this rule provides a degree of flexibility, at § 223.101(b)(3), which provides that a Contracting Officer may determine a prospective purchaser that has been seriously deficient in previous contract performance to be responsible if the Contracting Officer determines that the circumstances of previous deficiencies were (1) properly beyond the purchaser's control, or (2) that the purchaser has taken appropriate corrective action.

With respect to the first criterion and defaults of high-priced timber, the price a purchaser bids for a particular sale generally is within the control of that purchaser. As to the second criterion, corrective action taken by the purchaser to avoid future deficiencies in performance and the corresponding reduction of risk to the Government in doing business with that prospective purchaser are also clearly relevant to the determination of current responsibility. Among actions taken by the purchaser which reduce the risk of deficient performance to the Government and which will be among the facts considered by the Contracting Officer, is an increased downpayment required of a purchaser with the serious performance deficiencies identified in § 223.49(e).

Under the final rule, if a purchaser or its affiliates have outstanding obligations to the Government through defaulting of Forest Service or Bureau of Land Management timber sale contracts after the effective date of this rule, and the contract value of the previously defaulted timber is $100,000 or more, the downpayment on any new contract, if awarded to that purchaser, will be approximately twice the amount as that currently required pursuant to 36 CFR 223.49. The additional downpayment required by this final rule reflects some of the additional risk of doing business with a purchaser who has failed to perform on another contract but who otherwise meets all of the requirements of the sale and is determined to be a responsible entity. For example, the decision by a company to default a contract may be an economic one. The company may otherwise have had a good performance record and generally be on sound economic footing but choose to default a contract to reduce its economic losses.

The standard downpayment represents a monetary commitment to perform the contract at issue and reduces the risk of nonperformance. Where a timber sale purchaser has failed to perform under one contract, the Government may reasonably assume that that purchaser may fail to perform on another contract in the future. The additional downpayment required by this rule reflects the additional risk of doing business with a purchaser who has failed to perform on another contract but who otherwise meets all of the requirements of the sale and is determined to be a responsible entity. Sound business practice requires this additional security where it is determined to do further business with a concern even though that concern has failed to perform on one or more other contracts.

By contrast, a prospective purchaser who has been seriously deficient in contract performance, absent mitigating circumstances, is not a responsible entity with which the Government should do business. Under this final rule, such a prospective purchaser would be denied award (36 CFR 223.101(b)(3)). Furthermore, failure to perform and serious contract violations are listed causes for debarment which, dependent upon the seriousness of the purchaser's acts or omissions and any mitigating factors, may lead to a debarment decision by the Forest Service Debarring Official (36 CFR 223.137, 52 FR 43324–43334, November 12, 1987).

Affiliates are included in the requirement for additional downpayments and, where appropriate, in determining purchaser responsibility to assure that the Government's interests are protected when doing business. When one company or individual directly or indirectly controls or has the power to control the other, an affiliation is determined to exist. Common management, common ownership, and contractual relationships are among the factors considered in determining affiliation. The Forest Service will use the Small Business Administration regulations on affiliation found at 13 CFR 121.3 as guidance in determining whether or not concerns are affiliated. The inclusion of affiliates will help to assure that sales are operated and to reduce the risk of nonperformance.

The intent of this rulemaking is to improve procedures for the sale of public timber in light of recent experiences. The Department believes better timber sale contracting may prevent or at least minimize the adverse effects of delayed performance discussed above.

Regulatory Impact

This action has been submitted to the Office of Management and Budget for review pursuant to Executive Order 12291. It has been determined that this regulation is not a major rule. It does not change the total amount a purchaser would pay for National Forest System timber, although it would affect when a purchaser with a recent history of poor timber sale contract performance would pay for timber.

The procedures implemented in this rule will not have an annual effect on the economy of $100 million or more, will not result in major increases in costs for consumers, individual industries, Federal, State or local Government agencies or geographic regions, and will not have significant adverse effects on the ability of United States-based industries to compete with foreign-based enterprises in domestic or export markets. On the contrary, the proposed requirements will contribute to the economic well-being of timber dependent communities, the orderly flow of timber to market and of receipts to the Treasury, strengthen the orderly accomplishment of resource management objectives, and reduce administrative costs associated with settling claims against defaulting purchasers.

It has also been determined that this rule will not have significant economic impact on a substantial number of small entities. There are very few small entities that have defaulted more than $100,000 worth of Federal timber. While it cannot be predicted with certainty how many small business concerns will choose to default in the future, this final rule would affect less than 50 small entities were it to be applied to existing defaulters. In addition, the Certificate of Competency procedures as applied by the Small Business Administration will continue to cover small firms under the proposed bidder responsibility standards.

Based on both experience and environmental analysis, the rule will have no significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4) Furthermore, the proposed rule will not result in additional procedures or paperwork not already required by law. Therefore, no additional reviews or clearances pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), or implementing regulations at 5 CFR Part 1320 are required.

Lists of Subjects in 36 CFR Part 223

Exports, Government contracts, National forests, Reporting and recordkeeping requirements, Timber.

Therefore, for the reasons set forth above, Subpart B of Part 223, chapter II of Title 36 of the Code of Federal Regulations is amended as follows:

PART 223—[AMENDED]

1. The authority citation for Part 223 continues to read as follows:

Authority: Sec. 14, Pub. L. 94–588, 90 Stat. 2958, 16 U.S.C. 472a, unless otherwise noted. Secs. 223.49 and 223.50 also issued under Sec. 2, Pub. L. 98–478, 98 Stat. 2213, 16 U.S.C. 618.

Subpart B—[Amended]

2. Amend § 223.49 by adding new paragraphs (a)(5), and (e) through (i) to read as follows:

§ 223.49 Downpayment.

(a) * * *

(5) *Affiliate.* Concerns or individuals are affiliates if directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. In determining whether or not

affiliation exists, the Forest Service shall consider all appropriate factors, including, but not limited to, common ownership, common management, and contractual relationships.

* * * * *

(e) A purchaser or any affiliate of that purchaser, awarded a Forest Service timber sale contract must meet the additional downpayment requirements of paragraph (g) of this section under the following circumstances:

(1) The purchaser or its affiliate after September 29, 1988 has failed to perform in accordance with the terms of a Forest Service or Bureau of Land Management timber sale contract which results in notification by a Contracting Officer that a contract has expired uncompleted or is terminated for cause; and

(2) The estimated value of the unscaled timber on scaled sales, or the estimated value of the timber outstanding on tree measurement sales, included in those terminated or expired contracts exceeds $100,000, and

(3) Unpaid damages claimed by the Government remain outstanding prior to award of the new sale at issue and corrective action has not been taken to avoid future deficient performance.

(f) A subsequent final determination by the Contracting Officer or by a court of competent jurisdiction that a contract was improperly classified under the criteria in paragraph (e) of this section will result in the refund or credit of any unobligated portion of the amount of downpayment exceeding that required by paragraphs (c) and (d) and the limitations of paragraph (h) on application of downpayment shall no longer apply.

(g) Notwithstanding the provisions of paragraphs (c) and (d) of this section, a purchaser meeting the criteria of paragraph (e) of this section must make a minimum downpayment equal to 20 percent of the total advertised value of that sale, plus 40 percent of the total bid premium. This higher downpayment requirement applies throughout the National Forest System, except in those areas where the Chief of the Forest Service determines, before advertisement of the sale, that another downpayment rate is necessary to achieve the management objectives of the National Forest System.

(1) In calculating bid premiums for the downpayment requirement, the Forest Service shall not include the portion of the bid premium that offsets ineffective purchaser credit.

(2) To determine the amount of the downpayment due on a sale where the timber is measured in units other than board feet, the Forest Service shall convert the measure to board feet, using appropriate conversion factors with any necessary adjustments.

(h) A purchaser subject to the additional downpayment requirements of paragraph (g) of this section cannot apply the amount deposited as a downpayment to other uses until:

(1) *On scaled sales,* the estimated value of the unscaled timber is equal to or less than the amount of the downpayment; or

(2) *On tree measurement sales,* the estimated value remaining to be cut and removed as shown on the timber sale statement of account is equal to or less than the amount of the downpayment.

(i) For the purpose of releasing funds deposited as downpayment by a purchaser subject to paragraph (f) of this section, the Forest Service shall compute the estimated value of timber as follows:

(1) *On scaled sales,* the estimated value of the unscaled timber is the sum of the products obtained by multiplying the current contract rate for each species by the difference between the advertised volume and the volume that has been scaled of that species.

(2) *On tree measurement sales,* the estimated value of the timber outstanding (that not shown on the timber sale statement of account as cut and removed) is the sum of the products obtained by multiplying the current contract rate for each species by the difference between the advertised volume and the volume that has been shown on the timber sale statement to have been cut and removed of the species. The current contract rate for each species is that specified in each Forest Service timber sale contract.

3. Revise the introductory text and paragraph (c) of § 223.100 to read as follows:

§ 223.100 Award to highest bidder.

The sale of advertised timber shall be awarded to the responsible bidder submitting the highest bid that conforms to the conditions of the sale as stated in the prospectus unless:

* * * * *

(c) The highest bidder is notoriously or habitually careless with fire.

* * * * *

§§ 223.101 and 223.102 [Redesignated as §§ 223.102 and 223.103]

§ 223.103 [Removed]

4. Remove § 223.103, redesignate §§ 223.101 and 223.102 as §§ 223.102 and 223.103 respectively, and add a new § 223.101 to read as follows:

§ 223.101 Determination of purchaser responsibility.

(a) A Contracting Officer shall not award a timber sale contract unless that officer makes an affirmative determination of purchaser responsibility. In the absence of information clearly indicating that the prospective purchaser is responsible, the Contracting Officer shall conclude that the prospective purchaser does not qualify as a responsible purchaser.

(b) To determine a purchaser to be responsible, a Contracting Officer must find that:

(1) The purchaser has adequate financial resources to perform the contract or the ability to obtain them;

(2) The purchaser is able to perform the contract within the contract term taking into consideration all existing commercial and governmental business commitments;

(3) The purchaser has a satisfactory performance record on timber sale contracts. A prospective purchaser that is or recently has been seriously deficient in contract performance shall be presumed not to be responsible, unless the Contracting Officer determines that the circumstances were beyond the purchaser's control and were not created through improper actions by the purchaser or affiliate, or that the purchaser has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably under a contract is strong evidence that a purchaser is not a responsible contractor. The Contracting Officer shall consider the number of contracts involved and extent of deficiency of each in making this evaluation;

(4) The purchaser has a satisfactory record of integrity and business ethics;

(5) The purchaser has or is able to obtain equipment and supplies suitable for logging the timber and for meeting the resource protection provisions of the contract;

(6) The purchaser is otherwise qualified and eligible to receive an award under applicable laws and regulations.

(c) If the prospective purchaser is a small business concern and the Contracting Officer determines that the purchaser does not qualify as a responsible purchaser on an otherwise acceptable bid, the Contracting Officer shall refer the matter to the Small Business Administration which will decide whether or not to issue a Certificate of Competency.

(d) Affiliated concerns, as defined in § 223.49(a)(5) of this subpart are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the Contracting Officer shall consider an affiliate's past performance and integrity when they may adversely affect the prospective purchaser's responsibility.

Date: August 23, 1988.

Peter C. Myers,

Deputy Secretary of Agriculture.

[FR Doc. 88-19703 Filed 8-29-88; 8:45 am]

BILLING CODE 3410-11-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA 6805]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule lists communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If FEMA receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will be withdrawn by publication in the **Federal Register**.

EFFECTIVE DATES: The third date ("Susp.") listed in the third column.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646-2717, Federal Center Plaza, 500 C Street, Southwest, Room 416, Washington, DC 20472.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4022), prohibits flood insurance coverage as authorized under the National Flood Insurance Program (42 U.S.C. 4001-4128) unless an appropriate public body shall have adopted adequate floodplain management measures with effective enforcement measures. The communities listed in this notice no longer meet that statutory requirement for compliance with program regulations (44 CFR Part 59 et. seq.). Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**. In the interim, if you wish to determine if a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office of the NFIP servicing contractor.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Disaster Relief Act of 1974 not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas. (Section 202(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column.

The Administrator finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified. Each community receives a 6-month, 90-day, and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. For the same reasons, this final rule may take effect within less than 30 days.

Pursuant to the provision of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, FEMA, hereby certifies that this rule if promulgated will not have a significant economic impact on a substantial number of small entities. As stated in section 2 of the Flood Disaster Protection Act of 1973, the establishment of local floodplain management together with the availability of flood insurance decreases the economic impact of future flood losses to both the particular community and the nation as a whole. This rule in and of itself does not have a significant economic impact. Any economic impact results from the community's decision not to (adopt) (enforce) adequate floodplain management, thus placing itself in noncompliance of the Federal standards required for community participation. In each entry, a complete chronology of effective dates appears for each listed community.

List of Subjects in 44 CFR Part 64

Flood insurance—floodplains.

1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 et. seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

2. Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

§ 64.6 List of eligible communities.

State and location	Community	Effective dates of authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Region II—Minimal Conversions				
New York:				
Carlisle, Town of, Schoharie County	361193	Sept. 26, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Sept. 1, 1988.
Seward, Town of, Schoharie County	361199	Oct. 3, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.

State and location	Community	Effective dates of authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Region IV				
Alabama: Avon, Town of, Houston County	010100	Dec. 30, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Region V				
Indiana:				
White County, Unincorporated areas	180447	Aug. 3, 1979, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Williamsport, Town of, Warren County.	180272	June 3, 1976, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Attica, City of, Fountain County	180065	July 28, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Austin, Town of, Scott County	180233	Dec. 30, 1976, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Covington, City of, Fountain County	180066	July 1, 1975, Emerg.; Sept. 1, 1988, Reg.; Spet. 1, 1988, Susp	9-1-88	Do.
Clinton County, Unincorporated Areas.	180029	Feb. 13, 1976, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Fayette County, Unincorporated Areas.	180417	Apr. 11, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Franklin County, Unincorporated Areas.	180068	May 15, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Laurel, Town of, Franklin County	180306	May 27, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Tipton County, Unincorporated Areas	180475	Nov. 1, 1979, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Michigan:				
Banks, Township of, Antrim County	260643	Oct. 29, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Big Rapids, Township of, Mecosta County.	260135	Aug. 20, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Ely, Township of, Marquette County	260449	Nov. 9, 1981, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Minnesota:				
Carlton County, Unincorporated Areas.	270039	Aug. 16, 1974, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Todd County, Unincorporated Areas	270551	Feb. 1, 1974, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Douglas County, Unincorporated Areas.	270623	Apr. 16, 1974, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Martin County, Unincorporated Areas	270641	May 20, 1974, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Meeker County, Unincorporated Areas.	270280	Apr. 22, 1974, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Wisconsin:				
Adams, City of, Adams County	550002	May 31, 1974, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Bayfield County, Unincorporated Areas.	550539	June 6, 1974, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Neskoro, Village of, Marquette County.	550267	June 9, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Rosholt, Village of, Portage County	550377	June 24, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Superior, Village of, Douglas County	550117	June 28, 1975, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Region VII				
Nebraska: Bayard, City of, Morrill County	310347	Aug. 13, 1976, Emerg.; Sept. 1, 1988, Reg.; Sept. 1, 1988, Susp	9-1-88	Do.
Region I—Regular Program				
Connecticut: Canaan, Town of, Litchfield County.	090044	July 3, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Maine: Hallowell, Town of, Kennebec County.	230069	Jan. 13, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Region II				
New York: Union Vale, Town of, Dutchess County.	361146	July 28, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Region III				
Pennsylvania:				
Barrett, Township of, Monroe County	421884	Dec. 26, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Bedford, Borough of, Bedford County	421228	July 30, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Carroll Valley, Borough of, Adams County.	422635	Dec. 4, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Paradise, Township of, Monroe County.	421891	Jan. 30, 1980, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Regular Program				
Pennsylvania:				
Price, Township of, Monroe County	421894	Sept. 29, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Rockland, Township of, Berks County	421098	July 29, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp.	9-2-88	Do.
Lackawaxen, Township of, Pike County.	421966	July 7, 1975, Emerg.; Aug. 4, 1988, Reg.; Sept. 2, 1988, Susp	8-4-88	Do.
Region IV				
North Carolina: Mitchell County, Unincorporated Areas.	370161	July 18, 1979, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Tennessee: Lexington, City of, Henderson County.	470089	Feb. 26, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.
Georgia: Woodstock, City of, Cherokee County.	130264	Jan. 20, 1976, Emerg.; July 15, 1988, Reg.; Sept. 2, 1988, Susp	9-2-88	Do.

State and location	Community	Effective dates of authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Region V				
Illinois: Elkhart, Village of, Logan County	171010	Feb. 12, 1982, Emerg.; Feb. 12, 1982, Reg.; Sept. 2, 1988, Susp	9–2–88	Do.
Regular Program				
Illinois:				
Greenview, Village of, Menard County.	170754	Aug. 7, 1985, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9–2–88	Do.
Lincoln, City of, Logan County	170428	June 16, 1975, Emerg.; Oct. 16, 1979, Reg.; Sept. 2, 1988, Susp	9–2–88	Do.
Logan County, Unincorporated Areas	170427	May 11, 1973, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9–2–88	Do.
Menard County, Unincorporated Areas.	170505	May 1, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9–2–88	Do.
Morton, Village of, Tazewell County	170652	June 23, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9–2–88	Do.
Minnesota: Mahnomen, City of, Mahnomen County.	270266	May 8, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9–2–88	Do.
Ohio: Port Jefferson, Village of, Shelby County.	390506	May 14, 1975, Emerg.; Sept. 2, 1988, Reg.; Sept. 2, 1988, Susp	9–2–88	Do.
Region III—Minimal Conversions				
West Virginia: Pennsboro, City of, Ritchie County.	540182	July 2, 1975, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Sept. 16, 1988
Region IV				
Mississippi: Yalobusha County, Unincorporated Areas.	280239	June 15, 1983, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Region V				
Indiana:				
Gentryville, Town of, Spencer County	180394	July 3, 1975, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Huntingburg, City of, Duboise County	180362	Apr. 1, 1976, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Michigan: Cannon, Township of, Kent County.	260734	Apr. 8, 1983, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Wisconsin:				
Brandon, Village of, Fond du Lac County.	550132	Mar. 31, 1975, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Pigeon Falls, Village of, Trempealeau County.	550446	Mar. 26, 1976, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Minimal Conversions				
Wisconsin:				
Shell Lake, City of, Washburn County	550469	Nov. 8, 1974, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Tony, Village of, Rusk County	550377	July 22, 1975, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Region III—Regular Program				
Virginia: Buchanan County Unincorporated Areas.	510024	Nov. 4, 1974, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Region IV				
Kentucky:				
Augusta, City of, Bracken County	210022	Feb. 26, 1975, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Smithland, City of, Livingston County	210147	Nov. 3, 1975, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Region V				
Michigan:				
Colon, Township of, St. Joseph County.	260510	Mar. 9, 1977, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Colon, Village of, St. Joseph County	260511	Mar. 9, 1977, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Minnesota: Stearns County, Unincorporated Areas.	270546	Mar. 23, 1973, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Ohio: Zanesville, City of, Muskingum County.	390427	Apr. 15, 1975, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Region VI				
Arkansas: White Hall, City of, Jefferson County.	050375	Aug. 11, 1975, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Region VIII				
North Dakota: Valley City, City of, Barnes County.	380002	Apr. 11, 1974, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Region IX				
Arizona: Mohave County, Unincorporated Areas.	040058	May 6, 1974, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
California: Redland, City of, San Bernardino County.	060279	Apr. 12, 1974, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.
Hawaii: Hawaii County, Unincorporated Areas.	155166	June 5, 1970, Emerg.; Sept. 16, 1988, Reg.; Sept. 16, 1988, Susp	9–16–88	Do.

Code for reading third colum: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Harold T. Duryee,

Administrator, Federal Insurance Administration.

[FR Doc. 88-19622 Filed 8-29-88; 8:45 am]

BILLING CODE 6718-03-M

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44 CFR Part 64

[Docket No. FEMA 6804]

List of Communities Eligible for the Sale of Flood Insurance

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule.

SUMMARY: This rule lists communities participating in the National Flood Insurance Program (NFIP). These communities have applied to the program and have agreed to enact certain floodplain management measures. The communities' participation in the program authorizes the sale of flood insurance to owners of property located in the communities listed.

EFFECTIVE DATES: The dates listed in the third column of the table.

ADDRESS: Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurance Program (NFIP) at: P.O. Box 457, Lanham, Maryland 20706, Phone: (800) 638-7418.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646-2717, Federal Center Plaza, 500 C Street, Southwest, room 416, Washington, DC 20472.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Since the communities on the attached list have recently entered the NFIP, subsidized flood insurance is now available for property in the community.

In addition, the Director of the Federal Emergency Management Agency has identified the special flood hazard areas in some of these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the fourth column of the table. In the communities listed where a flood map has been published, section 102 of the Flood Disaster Protection Act of 1973, as amended, requires the purchase of flood insurance as a condition of Federal or federally related financial assistance for acquisition or construction of buildings in the special flood hazard area shown on the map.

The Director finds that the delayed effective dates would be contrary to the public interest. The Director also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

The Catalog of Domestic Assistance Number for this program is 83.100 "Flood Insurance."

Pursuant to the provisions of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that this rule, if promulgated will not have a significant economic impact on a substantial number of small entities. This rule provides routine legal notice stating the community's status in the NFIP and imposes no new requirements or regulations on participating communities.

List of Subjects in 44 CFR Part 64

Flood insurance and floodplains.

1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq., Reorganization Plan No. 3 of 1978, E.O. 12127.

2. Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

In each entry, a complete chronology of effective dates appears for each listed community. The entry reads as follows:

§ 64.6 List of eligible communities.

State and location	Community No.	Effective dates of authorization/cancellation of sale of flood insurance in community	Current effective map date
Arizona: Colorado City, Town of, Mohave County [1]	040059	July 1, 1988, Emerg	
Missouri: Keytesville, City of, Chariton County, Eff. FIRM: 7-4-88.	290723	July 4, 1988, Emerg.; July 4, 1988, Susp	
Iowa:			
Guthrie Center, City of, Guthrie County	190135	July 8, 1975, Emerg.; June 1, 1987, Reg.; June 1, 1987, Susp.; July 5, 1988, Rein	6-1-87
Kiron, City of, Crawford County	190098	Nov. 23, 1976, Emerg.; Aug. 1, 1986, Reg.; June 3, 1988, Susp.; July 5, 1988, Rein.	8-1-86
Marquette, City of, Clayton County	195182	Apr. 16, 1971, Emerg.; Jan. 19, 1982, Reg.; June 3, 1988, Susp.; July 5, 1988, Rein.	1-19-72
What Cheer, City of, Keokuk County	190179	Jan. 28, 1976, Emerg.; Aug. 1, 1987, Reg.; Aug. 1, 1987, Susp.; July 5, 1988, Rein	8-1-87
Louisa County, Unincorporated Areas	190193	Oct. 16, 1974, Emerg.; June 1, 1987, Reg.; June 3, 1988, Susp.; July 6, 1988, Rein	6-1-87
Texas:			
Crystal City, City of, Zavala County	480668	Nov. 29, 1974, Emerg.; Sept. 1, 1987, Reg.; Sept. 1, 1987, Susp.; July 1, 1988, Rein.	9-1-87
Frankston, City of, Anderson County	480003	Feb. 1, 1977, Emerg.; June 1, 1988, Reg.; June 1, 1988, Susp.; July 1, 1988, Rein	6-1-88
Iowa:			
Hiawatha, City of, Linn County	190441	Aug. 3, 1978, Emerg.; Feb. 3, 1982, Reg.; June 3, 1988, Susp.; July 1, 1988, Rein	2-3-82
Hinton, City of, Plymouth County	190224	Aug. 27, 1976, Emerg.; Sept. 27, 1982, Reg.; June 3, 1988, Susp.; July 1, 1988, Rein.	9-27-82
Lawton, City of, Woodbury County	190292	Aug. 8, 1975, Emerg.; Sept. 1, 1986, Reg.; June 3, 1988, Susp.; July 1, 1988, Rein	9-1-86
Manning, City of, Carroll County	190046	Nov. 8, 1974, Emerg.; Sept. 1, 1986, Reg.; June 3, 1988, Susp.; July 1, 1988, Rein	9-1-86
New York:			
Esperance, Village of, Schoharie County	36152	July 27, 1976, Emerg.; Sept. 16, 1982, Reg.; May 17, 1988, Susp.; July 7, 1988, Rein.	9-16-82
Plandome, Village of, Nassau County*	360484	June 18, 1975, Emerg.; May 25, 1978, Reg.; June 15, 1988, Susp.; July 7, 1988, Rein.	NSFHAs
Mechanicville, City of, Saratoga County*	360721	July 1, 1975, Emerg.; Jan. 5, 1984, Reg.; June 15, 1988, Susp.; July 7, 1988, Rein	1-5-84
Smithville, Town of, Chenango County*	361040	Apr. 17, 1980, Emerg.; Nov. 4, 1983, Reg.; June 15, 1988, Susp.; July 7, 1988, Rein.	11-4-83
Taghkanic, Town of, Columbia County*	361324	Aug. 5, 1975, Emerg.; Jan. 3, 1986, Reg.; June 15, 1988, Susp.; July 7, 1988, Rein	1-3-86
Van Etten, Village of, Chemung County [2] *	361056	July 11, 1975, Emerg.; June 15, 1988, Susp.; July 7, 1988, Rein	7-1-88

State and location	Community No.	Effective dates of authorization/cancellation of sale of flood insurance in community	Current effective map date
Syracuse, City of, Onodaga County	360595	Aug. 2, 1974, Emerg.; May 3, 1982, Reg.; June 15, 1988, Susp.; July 7, 1988, Rein	5-3-82
Pennsylvania: Greenwood, Township of, Juniata County.	421741	July 28, 1975, Emerg.; Dec. 3, 1987, Reg.; Dec. 3, 1987, Susp.; July 7, 1988, Rein	12-3-87
New York: Shoreham, Village of, Suffolk County	361506	May 30, 1975, Emerg.; May 25, 1978, Reg.; June 15, 1988, Susp.; July 8, 1988, Rein.	NSFHAs
Colorado: Jefferson County, Unincorporated Areas	080087	July 5, 1973, Emerg.; Aug. 5, 1986, Reg.; Aug. 5, 1986, Susp.; July 8, 1988, Rein	8-5-86
Arizona: Cave Creek, Town of, Maricopa County [3]	040127-New	June 9, 1988, Emerg.; June 9, 1988, Reg	8-5-86
Alabama: Chambers County, Unincorporated Areas	010026	July 29, 1975, Emerg.; July 4, 1988, Reg.; July 4, 1988, Susp.; July 6, 1988, Rein	
Pennsylvania: Snake Spring, Township of, Bedford County.	421349	Feb. 28, 1977, Emerg.; July 4, 1988, Reg.; July 4, 1988, Susp.; July 6, 1988, Rein	7-4-88
Iowa:			
Vail, City of, Crawford County	190101	June 30, 1975, Emerg.; Aug. 19, 1986, Reg.; June 3, 1988, Susp.; July 11, 1988, Rein.	8-19-86
Aredale, City of, Butler County	190035	Nov. 3, 1975, Emerg.; Aug. 1986, Reg.; June 3, 1988, Susp.; July 12, 1988, Rein	8-19-86
Sibley, City of, Osceola County	190218	July 23, 1975, Emerg.; Sept. 27, 1985, Reg.; June 3, 1988, Susp.; July 12, 1988, Rein.	9-27-85
New York: Rushford, Town of, Allegany County	360033	June 9, 1975, Emerg.; Dec. 23, 1983, Reg.; June 15, 1988, Susp.; July 15, 1988, Rein.	12-23-83
Iowa: Brayton, City of, Audubon County	190920	June 9, 1975, Emerg.; Aug. 19, 1985, Reg.; June 3, 1988, Susp.; June 27, 1988, Rein.	8-19-85
Florida: Destin, City of, Okaloosa County	125158	July 6, 1988, Emerg.; July 6, 1988, Reg	1-15-88
North Carolina:			
Old Fort, Town of, McDowell County [4]	370149	July 12, 1988, Emerg	
Dallas County, Unincorporated Areas	050061	July 12, 1988, Emerg	6-17-77
Michigan: Morley, Village of, Mecosta County	260585	Oct. 12, 1976, Emerg.; July 16, 1987, Reg.; July 16, 1987, Susp.; July 15, 1988, Rein.	7-16-87
North Carolina: Whiteville, City of, Columbus County [*].	370071	Sept. 3, 1974, Mar. 4, 1988, Susp.; June 24, 1988, Rein	6-18-76
South Carolina: Lancaster County, Unincorporated Areas.	450120	July 3, 1975, Emerg.; Jan. 6, 1983, Reg.; Jan. 6, 1983, Susp.; July 20, 1988, Rein	1-6-83
Iowa: Hamburg, City of, Fremont County	190133	Aug. 11, 1975, Emerg.; June 3, 1988, Susp.; July 20, 1988, Rein	8-11-75
Nebraska: Orlean, Village of, Harland County	310394	Mar. 20, 1984, Emerg.; May 1, 1988, Reg.; May 1, 1988, Susp.; July 20, 1988, Rein.	5-1-88
Florida: Blountstown, City of, Calhoun County	120060	Mar. 17, 1975, Emerg.; May 1, 1980, Reg.; June 18, 1987, Susp.; July 20, 1988, Rein.	6-18-88
Kentucky: Johnson County, Unincorporated Areas	210339	Oct. 30, 1978, Emerg.; May 4, 1988, Reg.; May 4, 1988, Susp.; July 18, 1988, Rein	5-4-88
Pennsylvania: Bethel, Township of, Armstrong County.	421300	Aug. 8, 1975, Emerg.; June 3, 1988, Reg.; June 3, 1988, Susp.; July 25, 1988, Rein.	8-8-75
Texas: Quintana, Village of, Brazoria County	481301	May 8, 1971, Emerg.; May 8, 1971, Reg.; May 4, 1988, Susp.; July 26, 1988, Rein	6-5-85
Illinois: Hinckley, Village of, Dekalb County	170184	July 26, 1988, Emerg	3-1-74
Maine: Berwick, Town of, York County	230144	July 26, 1988, Emerg	8-9-74
New Hampshire: Kingston, Town of, Rockingham County.	330217	July 26, 1988, Emerg	
North Carolina: Rockingham County, Unincorporated Areas [5].	370350	Nov. 6, 1987, Emerg	6-16-78
Pennsylvania: Point Marion, Borough of, Fayette County.	421617	July 3, 1974, Emerg.; July 4, 1988, Reg.; July 4, 1988, Susp.; July 26, 1988, Rein	7-4-88
Montana: Flathead County, Unincorporated Areas	300023	Oct. 31, 1975, Emerg.; Sept. 5, 1984, Reg.; July 15, 1988, Susp.; July 27, 1988, Rein.	
New Mexico: Tatum, Town of, Lea County	350032	Oct. 16, 1980, Emerg.; July 1, 1988, Reg.; July 1, 1988, Susp.; July 27, 1988, Rein	7-1-88
New York: Buchanan, Village of, Westchester County.	361534	June 28, 1977, Emerg.; July 27, 1979, Reg.; May 17, 1988, Susp.; July 25, 1988, Rein.	7-27-79

[1] The Town of Colorado City, Arizona will be converted to the Regular Program on August 4, 1988.

[2] Reinstated into the Regular Program.

[3] The Town of Cave Creek, Arizona is a regular program entry. The Town will use the County's FIRM dated April 15, 1988, for floodplain management and flood insurance purposes.

[4] The Town of Old Fort, North Carolina converted to the Regular Program effective on July 15, 1988. The effective FIRM date is July 15, 1988.

[5] This community was erroneously omitted from the November 1987 FEDERAL REGISTER. Rockingham County is an emergency program entry.

[*] Minimal conversions.

Code for reading third column: Emerg.—Emergency, Reg.—Regular, Susp.—Suspension, Rein.—Reinstatement.

State and location	Community No.	Effective dates of authorization/cancellation of sale of flood insurance in community	Current effective map date
Region II—Minimal Conversions			
New York:			
Marion, Town of, Wayne County	361446	July 1, 1988, Suspension Withdrawn	7-1-88
Van Etten, Village of, Chemung County	361056	do	7-1-88
West Union, Town of, Steuben County	361437	do	7-1-88
Region IV			
Tennessee: McNairy County, Unincorporated Areas	470127	do	7-1-88
Region V			
Minnesota: Rock County, Unincorporated Areas	270642	do	7-1-88
Region VI			
New Mexico: Bayard, Village of, Grant County	350019	do	7-1-88

State and location	Community No.	Effective dates of authorization/cancellation of sale of flood insurance in *community*	Current effective map date
Region VII			
Kansas: Delphos, City of, Ottawa County	200487	do	7-1-88
Nebraska: Dawson County, Unincorporated Areas	310058	do	7-1-88
Region I—Regular Conversions			
Massachusetts: Bedford, Town of, Middlesex County.	255209	July 4, 1988, Suspension Withdrawn.	7-4-88
Vermont: Pittsford, Town of, Rutland County	500098	do	7-4-88
Region II			
New Jersey: Bound Brook, Borough of, Somerset County.	340430	do	7-4-88
Region III			
Pennsylvania:			
Hamiltonban, Township of, Adams County	421252	do	7-4-88
Highland, Township of, Adams County	421253	do	7-4-88
Menallen, Township of, Adams County	421256	do	7-4-88
West Virginia: Harrison County, Unincorporated Areas.	540053	do	7-4-88
Region IV			
Alabama: Lanett, City of, Chambers County	010029	do	7-4-88
Region V			
Ohio: Jewett, Village of, Harrison County	390259	do	7-4-88
Region VII			
Missouri:			
Andrew County, Unincorporated Areas	290004	do	7-4-88
Clinton, City of, Henry County	290155	do	7-4-88
Region VIII			
North Dakota: Bowman, City of, Bowman County	330012	do	7-4-88
South Dakota: Fort Pierre, City of, Stanley County	465419	do	10-15-80
Region IX			
California: San Joaquin County, Unincorporated Areas.	060299	do	7-4-88
Region I—Regular Conversions			
Maine: Anson, Town of, Somerset County	230123	July 15, 1988, Suspension Withdrawn	7-15-88
Massachusetts:			
Holbrook, Town of, Norfolk County	255212	do	7-15-88
Huntington, Town of, Hampshire County	250165	do	7-15-88
Region III			
Pennsylvania:			
Bethel, Township of, Berks County	421052	do	7-15-88
Penn, Township of, Berks County	421091	do	7-15-88
Salem, Township of, Wayne County	422172	do	7-15-88
Tunkhannock, Township of, Wyoming County	422206	do	7-15-88
Virginia: Front Royal, Town of, Warren County	510167	do	7-15-88
Region IV			
Georgia:			
Cherokee County, Unincorporated Areas	130424	do	7-15-88
Canton, City of, Cherokee County	130039	do	7-15-88
Holly Springs, City of, Cherokee County	130425	do	7-15-88
Woodstock, City of, Cherokee County	130264	do	7-15-88
Region V			
Wisconsin:			
Almena, Village of, Barron County	550009	do	7-15-88
Hawkins, Village of, Rusk County	550373	do	7-15-88
Region VI			
New Mexico: Aztec, City of, San Juan County	350065	do	7-15-88
Region VIII			
Colorado: Boulder County, Unincorporated Areas	080023	do	7-15-88
Montana: Bozeman, City of, Gallatin County	300028	do	7-15-88
Region IX			
California:			
Coronado, City of, San Diego County	060287	do	7-15-88
Encinitas, City of, San Diego County	060726	do	7-15-88
San Marcos, City of, San Diego County	060296	do	7-15-88
Santa Maria, City of, Santa Barbara County	060336	do	7-15-88
Nevada: Lander County, Unincorporated Areas	320013	do	7-15-88
Region IV			
Florida: Arcadia, City of, Desoto County	120072	July 16, 1988, Suspension Withdrawn	6-3-88

Code for reading third column: Emerg.—Emergency, Reg.—Regular, Susp.—Suspension, Rein.—Reinstatement.

Harold T. Duryee,
Administrator, Federal Insurance Administration.
[FR Doc. 88-19623 Filed 8-29-88; 8:45 am]
BILLING CODE 6718-21-M

FEDERAL MARITIME COMMISSION

46 CFR Parts 550 and 580

[Docket No. 85-19]

Tariff Publication of Free Time and Detention Charges Applicable to Carrier Equipment Interchanged With Shippers or Their Agents

AGENCY: Federal Maritime Commission.

ACTION: Final rule; stay of effective date.

SUMMARY: Because of numerous inquiries from carriers and conferences concerning various aspects of the Equipment Interchange Agreement (EIA) filing requirements, the Federal Maritime Commission has determined to provide an indefinite stay of the effective date of the Final Rule in Docket No. 85-19.

DATE: August 30, 1988.

FOR FURTHER INFORMATION CONTACT: Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573, Telephone: (202) 523-5725.

SUPPLEMENTARY INFORMATION: The Commission published the Final Rule in this proceeding in the **Federal Register** on February 26, 1988 (53 FR 5770) with an effective date of March 28, 1988. On March 9, 1988, a petition was filed by several conferences requesting a 90-day stay of the effective date. The purpose of the request was to allow carriers and conferences sufficient time to comply with the new rule. On March 21, 1988, (53 FR 9629, March 24, 1988) the Commission granted that request, extending the effective date of the Final Rule to June 26, 1988.

On June 17, 1988, (53 FR 23632, June 23, 1988) because of the continuing compliance difficulties faced by the industry, the Commission granted a further 90-day extension of the Rule's effective date until September 30, 1988. With a number of issues yet to be resolved regarding compliance with the various aspects of the Equipment Interchange Agreements filing requirements, the Commission had determined to grant an indefinite stay of the effective date of Docket No. 85-19. This stay will provide the Commission with an opportunity to address these issues either formally or informally and develop guidelines to assure compliance with the rule in a manner which both satisfies its intent and is not overly burdensome on the industry or the Commission.

By the Commission,

Joseph C. Polking,
Secretary.
[FR Doc. 88-19694 Filed 8-29-88; 8:45 am]
BILLING CODE 6730-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 87-602; RM-6091]

Radio Broadcasting Services; Roseburg, OR

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Michael R. Wyatt, substitutes Channel 276C2 for Channel 276A at Roseburg, Oregon, and modifies his license for Station KRSB-FM to specify the higher powered channel. Channel 276C2 can be allotted to Roseburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.5 kilometers (15.2 miles) west to accommodate petitioner's desired transmitter site. The coordinates for this allotment are North Latitude 43-14-43 and West Longitude 123-38-15. With this action, this proceeding is terminated.

EFFECTIVE DATE: September 26, 1988.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 87-602, adopted July 14, 1988, and released August 12, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the FM Table of Allotments for Roseburg, Oregon, is revised by removing Channel 276A and adding Channel 276C2.

Federal Communications Commission.

Steve Kaminer,
Deputy Chief, Policy and Rules Division, Mass Media Bureau.
[FR Doc. 88-19611 Filed 8-29-88; 8:45 am]
BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 87-481; RM-6000]

Radio Broadcasting Services; Elkton, VA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 253B1 for Channel 252A at Elkton, Virginia and modifies the construction permit BPH-8406071A to specify operation on the higher class channel, at the request of Stonewall Broadcasting Company. The upgraded facility could provide Elkton with its first wide coverage area FM service. A site restriction of 10.3 kilometers (6.4 miles) west of the city is required, at coordinates 38-22-42 and 78-44-07. With this action, this proceeding is terminated.

EFFECTIVE DATE: September 22, 1988.

FOR FURTHER INFORMATION CONTACT: Patricia Rawlings, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 87-481, adopted June 30, 1988, and released August 10, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments is amended, under Virignia, by removing Channel 252A and adding Channel 253B1 at Elkton.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-19609 Filed 8-29-88; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 675

[Docket No. 71147-8002]

Groundfish of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of inseason adjustment.

SUMMARY: NOAA announces the apportionment of amounts of Atka mackerel from reserve to domestic fishermen, catching and processing fish or delivering fish to domestic processors (DAP) under provisions of the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP). This action promotes optimum use of these groundfish by allowing domestic fisheries to proceed without interruption.

DATES: August 25, 1988. Comments will be accepted through September 9, 1988.

ADDRESS: Comments should be mailed to James W. Brooks, Acting Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, AK. 99802, or be delivered to Room 453, Federal Building, 709 West Ninth Street, Juneau, Alaska.

FOR FURTHER INFORMATION CONTACT: Patricia Peacock, Fishery Management Specialist, NMFS, 907-586-7230.

SUPPLEMENTARY INFORMATION: The FMP, which governs the groundfish fishery in the exclusive economic zone of the Bering Sea and Aleutian Islands Area (BSA) under the Magnuson Fishery Conservation and Management Act, is implemented by rules appearing at 50 CFR 611.93 and Part 675.

In 1988, 15 percent of Total Allowable Catch (TAC) for BSA groundfish was placed in the non-specific reserve, the initial specifications for DAP were determined, and the remaining amounts were provided to domestic fishermen delivering fish to foreign processors (JVP) (53 FR 894, January 14, 1988). No initial specification was provided for total allowable level of foreign fishing (TALFF) because domestic annual harvest (DAH) requirements exceeded TAC.

The following inseason actions have apportioned amounts from the reserve to DAP and/or JVP, or amounts from DAP to JVP: April 14 (53 FR 12772; April 19, 1988), May 5 (53 FR 16552, May 10, 1988), May 20 (53 FR 19303, May 25, 19988), June 17 (53 FR 23402, June 22, 1988), July 11 (53 FR 26599, July 14, 1988), and July 22 (53 FR 28229, July 27, 1988).

The Regional Director has determined from DAP catch-to-date and the DAP survey during May 1988, that DAP could harvest an additional 1,700 mt of Atka mackerel; therefore, 1,700 mt of Atka mackerel is transferred from the reserve to DAP (see Table 1).

This apportionment does not result in overfishing of Atka mackerel stocks because the sum of the adjusted DAP amount and initial JVP amount for Atka mackerel (53 FR 894, January 14, 1988) is less than the allowable biological catch for this species (see Table 1).

Classification

This action is taken under the authority of 50 CFR 675.20(b) and complies with Executive Order 12291.

Because immediate effectiveness of this notice will allow DAP fishermen to continue fishing for Atka mackerel, the Assistant Administrator for Fisheries finds for good cause that it is impractical and contrary to the public interest to provide prior notice and comment. Interested persons are invited to submit comments in writing to the address above for 15 days after the effective date of this notice, in accordance with § 675.20(b)(2)(i). The Secretary will consider all timely comments in deciding to modify an apportionment that has previously been made and will publish responses to those comments in the **Federal Register** as soon as practicable according to § 675.20(b)(2)(i). The Regional Director will make available to the public during business hours the aggregate data upon which this apportionment is based according to § 675.20(b)(2)(ii). See ADDRESSES.

List of Subjects in 50 CFR Part 675

Fish, Fisheries, Reporting and recordkeeping requirements.

TABLE 1—BERING SEA/ALEUTIANS REAPPORTIONMENTS OF INITIAL TAC

[All values are in metric tons]

		Current	This action	Revised
Atka Mackerel	DAH	17,850	+1,700	19,550
	DAP	80	+1,700	1,780
TAC=21,000; ABC=21,000	JVP	17,770	+0	17,770
Total (TAC=2,000,000)	DAP	796,320	+1,700	798,020
	JVP	1,176,284	+0	1,176,284
	Reserve	27,396	−1,700	25,696

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 25, 1988.

Ann D. Terbush,

Acting Director of Office Fisheries Conservation and Management National Marine Fisheries Service.

[FR Doc. 88-19709 Filed 8-25-88; 4:40 pm]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 53, No. 168
Tuesday, August 30, 1988

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

Business Loans, Fees

AGENCY: Small Business Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would change the existing regulation on what fees a participating lender and others may charge an applicant borrower for services. Major changes: a lender would be permitted to charge the borrower reasonable packaging fees; the Agency would not automatically review and evaluate fees for reasonableness; where the Agency determines that fees are excessive, the lender must make a refund or face a suspension or revocation action.

DATE: Comments must be submitted on or before October 31, 1988.

ADDRESS: Comments may be mailed to: Charles R. Hertzberg, Deputy Associate Administrator for Financial Assistance, 1441 L Street, NW., Room 804–D, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Charles R. Hertzberg, (202) 653–6574.

SUPPLEMENTARY INFORMATION: The present rules require the Small Business Administration (SBA) to review the fees which lenders charge borrowers and they prohibit fees that would defray the overhead of the lender. The Agency has now decided to ease the restrictions on the fees chargeable by a lender or its associate.

These proposed rules place on the borrower the initial responsibility for evaluating the reasonableness of the fees it is being charged a borrower. The Agency contemplates that as a general rule in the future it will only review fees if a borrower so requests, although SBA will continue to geneally monitor fees being charged across the country, and reserves the right to review any fees at any time. A lender or associate would be permitted to charge a borrower reasonable fees for packaging or other services. Reasonable is defined as customary for financial institutions in the geographic area where the loan is made. This will encourage a borrower to shop around. When the Agency does review fees being charged a borrower, it will use this community standard of reasonableness. If the Agency finds that the fees are excessive, the lender will be requested to refund the excessive fees to the applicant. If the lender refuses, the SBA reserves the right, under § 120.305 of these regulations (13 CFR 120.305) to take steps to revoke or temporarily suspend the eligibility of the lender to participate with SBA.

Under this proposed regulation, a lender or associate would be allowed to charge the applicant reasonable fees for services, including those services rendered by counsel, accountants, financial analysts, etc., who are salaried employees to defray overhead costs. A borrower would be permitted to pay a contingent fee for requested services actually rendered so long as the fee is based on time and hourly charges.

These proposed changes from the current regulations are the Agency's way of recognizing the reality of the commercial lending marketplace. The Agency is proposing to loosen its regulatory authority with respect to fees payable by borrowers, but it is not abidcating its authority to provide general oversight. Moreover, it will certainly undertake a detailed review in response to a borrower's complaint with respect to fees. The Agency is making no change in its present policy which permits a borrower to be charged for necessary out-of-pocket expenses incured for filing or recordation to perfect a security interest in borrower's assets, including obtaining title insurance. There is also no change in policy in which the Agency prohibits a lender from charging a borrower points or add-on interest.

For purposes of the Regulatory Flexibility Act (5 U.S.C. 605(b)), this proposed rule, if promulgated in final, will have a significant economic impact on a substantial number of small entities. In fiscal year 1987, SBA approved 16,436 guaranteed loans for an aggregate amount of $2.65 billion. In fiscal 1986, the Agency approved 16,093 guaranteed loans for an aggregate total of $2.52 billion. The Agency does not collect or maintain statistics on the fees participating lenders charge borrowers, but it may be presumed that each borrower paid some fees with respect to each loan, some payable to the borrower's own attorney or accountant (which is not covered by this regulation) and some payable to professional persons engaged by the lender at borrower's request. Based upon the largest conceivable estimate for fiscal 1987, the fees would not have exceeded $26 million. This proposed change does not contemplate any reporting or recordkeeping requirements to comply with this proposed rule. There are no Federal rules which duplicate, overlap or conflict with this proposed rule. The only alternatives to this proposed rule are to repeal any regulation on what charges a lender may impose on small business or to broaden the present regulation so that the Agency embraces greater regulatory control and oversight over the various fees imposed on borrowers.

SBA certifies that this proposed rule does not constitute a major rule for the purpose of Executive Order 12291, since, as above stated, the change is not likely to result in an annual effect on the economy of $100 million or more.

As stated above, this rule would not impose any additional reporting or recordkeeping requirements pursuant to the Paperwork Reduction Act, 44 U.S.C. Ch. 35.

List of Subjects in 13 CFR Part 120

Loan programs/business, Small business.

Accordingly, pursuant to the authority contained in section 5(b)(6) of the Small Business Act (15 U.S.C. 634(b)(6)), SBA proposes to amend Part 120, Chapter I, Title 13, Code of Federal Regulations, as follows:

PART 120—BUSINESS LOAN POLICY

1. The authority citation for Part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6) and 636 (a) and (h).

2. Section 120.104–2 is amended by revising paragraph (e) to read as follows:

§ 120.104–2 Service and commitment fees.

* * * * *

(e) *Fees for other services.* A Lender or Associate may charge an applicant reasonable fees for packaging and/or other services. Reasonable is defined as customary for Financial Institutions in the geographic area where the loan is being made. The Lender shall advise the applicant that he, she, or it is not required to obtain or pay for services that are unwanted. However, the applicant must take responsibility for the decision as to whether fees are reasonable. As a general rule, SBA will not review fees in the absence of a complaint by the applicant, although it reserves the right to do so. Where SBA undertakes a review of fees, and determines that fees charged are excessive, Lender's or Associate's failure to refund excessive fees to the applicant may result in an action by SBA to suspend or revoke Lender participant status in accordance with § 120.305 of this Part. Contingent fees may be charged to an applicant provided they (1) are based upon requested services actually rendered, and (2) are based on time and hourly charges. Expenses for necessary out-of-pocket costs, such as filing or recordation to perfect security interests, may be passed on to the applicant. A Lender shall not require that borrower pay points, and add-on interest shall not be used.

* * * * *

(Catalog of Federal Domestic Assistance Programs, No. 59.012, Small Business Loans)

Date: August 4, 1988.

James Abdnor,

Administrator.

[FR Doc. 88-19647 Filed 8-29-88; 8:45 am]

BILLING CODE 8025-01-M

FEDERAL TRADE COMMISSION

16 CFR Part 13

[Dkt. 9211]

Pacific Resources Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require, among other things, that through March 1997, Pacific Resources Inc., a Hawaii based corporation, obtain FTC approval before acquiring any terminalling, refining, or gasoline retail marketing assets in the state of Hawaii. It must also obtain Commission approval before acquiring any terminalling agreement, such as a long term lease, for more than 50 percent of a terminal's capacity.

DATE: Comments must be received on or before October 31, 1988.

ADDRESS: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Ronald B. Rowe, FTC/S-3302, Washington, DC 20580. (202) 326-2610.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 3.25(f) of the Commission's Rules of Practice (16 CFR 3.25(f)), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with the accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(14) of the Commission's Rules of Practice (16 CFR 4.9(b)(14)).

List of Subjects in 16 CFR Part 13

Gas, Oil, Trade practices.

In the Matter of Pacific Resources, Inc., a corporation. Agreement Containing Consent Order to Cease and Desist.

The agreement herein, by and between Pacific Resources, Inc., a corporation, hereinafter referred to as respondent, by their duly authorized officers and their attorneys, and counsel, for the Federal Trade Commission ("Commission"), is entered into in accordance with the Commission's rules governing consent Order procedures. In accordance therewith the parties hereby agree:

1. Respondent Pacific Resources, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Hawaii, with its principal place of business at 733 Bishop Street, Honolulu, Hawaii 96842.

2. Respondent has been served with a copy of the complaint issued by the Federal Trade Commission charging respondent with entering into an acquisition agreement that violates section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and if consummated, would violate section 7 of the Clayton Act, as amended, 15 U.S.C. 18. Respondent has filed an answer to the complaint denying the charges.

3. Respondent admits all jurisdictional facts set forth in the Commission's complaint in this proceeding.

4. Respondent waives:

a. Any further procedural steps;

b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

c. All rights to seek judicial review or otherwise challenge or contest the validity of the Order entered pursuant to this agreement; and

d. All rights under the Equal Access to Justice Act.

5. This agreement shall not become a part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify respondent, in which event it will take such action as it may consider appropriate, or issue its decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the said complaint issued by the Commission.

7. This agreement contemplates that, if accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 3.25 of the Commission's Rules, the Commission may, without further notice to respondent, (1) issue its decision containing the following Order to Cease and Desist in disposition of the proceeding, and (2) make information public with respect thereto. When so entered, the Order to Cease and Desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by stature for other orders. The Order shall become final upon service. Delivery by the U.S. Postal Service of the decision containing the agreed-to Order to respondent's address as stated in this agreement shall constitute service. Respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the Order, and no agreement, understanding, representation or interpretation not contained in the Order or in the agreement may be used to vary or contradict the terms of the Order.

8. Respondent has read the complaint and Order contemplated hereby. Respondent understands that once the Order has been issued, respondent will

be required to file one or more compliance reports showing that it has fully complied with the Order. Respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

Order

I.

As used in this Order, the following definitions shall apply:

(a) "Exchange agreement" means any arrangement or transaction or series of arrangements or transactions, other than a terminalling agreement as defined in subparagraph (j) of this paragraph, in which two or more persons or firms reciprocally transfer to each other or their respective consignees or assignees, quantities of petroleum products, without collecting a monetary price, except possibly some monetary accounting or settlement for the difference for differentials between quantity, transportation, storage, or handling of the exchanged products. An exchange agreement also includes a buy-sell arrangement or a purchase-and-sale transaction or any series of transactions or arrangements in which two or more firms or persons, at or about the same time, reciprocally agree to sell to and purchase from each other at some price but pursuant to mutual understanding, that one party's sale to the other is dependent or contingent upon the latter's reciprocal sale to the former.

(b) "Gasoline station" means a facility at which retail marketing is or has been conducted. "Gasoline station" does not include a facility that is closed and has not been used to sell gasoline to the public for a year or more.

(c) "Petroleum products" means any grade of leaded or unleaded gasoline and diesel fuel #2.

(d) "Refining" means converting crude oil into various refined petroleum products such as gasoline, diesel fuel and jet fuel.

(e) "Refinery" means a facility that converts crude oil into various refined petroleum products such as gasoline, diesel fuel and jet fuel.

(f) "Respondent" means Pacific Resources, Inc. ("PRI"), its predecessors, parent companies, subsidiaries, divisions, groups and affiliates controlled by respondent, and all their respective directors, officers, employees, agents and representatives and all their respective successors and assigns.

(g) "Retail marketing" means selling gasoline to the public.

(h) "Terminal" means any petroleum product facility in the State of Hawaii, not owned or operated by respondent on the date this Order becomes final, that has a total petroleum products storage capacity exceeding 10,000 barrels (42 U.S. gallons per barrel) and that has or had in the past two (2) years equipment to dispense smaller quantities from the storage tanks into tank trucks. "Terminal" does not include (i) an entire facility that has been closed and has not been used to store petroleum products for at least two (2) years prior to its proposed acquisition by respondent or (ii) any part of a facility that is used and has been used for the last two (2) years exclusively for the storage of products other than petroleum products.

(i) "Terminalling" means storing petroleum products at a terminal. A party is "engaged in terminalling" if it stores petroleum product at a facility that it owns or operates in whole or in part.

(j) "Terminalling agreement" means any arrangement whereby respondent (i) purchases or leases any part of a terminal, (ii) becomes the operator of any part of a terminal, or (iii) contracts for the use of any part of a terminal.

(k) "Throughput agreement" means any arrangement, other than a terminalling agreement as defined in subparagraph (j) of this paragraph, for receipt, storage and dispensing of petroleum products at a terminal owned or operated by another person or firm.

II.

It is ordered that for a period commencing on the date this Order becomes final and continuing through March 31, 1997, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without prior approval of the Federal Trade Commission, any part of the stock or share capital of any person or firm engaged in terminalling, refining, or retail marketing in the State of Hawaii, or any assets of, or interest in a refinery, terminal or gasoline station in the State of Hawaii.

It is further ordered that for a period commencing on the date this Order becomes final respondent shall cease and desist from entering into, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, any terminalling agreement in the State of Hawaii that takes effect before March 31, 1997.

Provided, however, that nothing in paragraph II of this Order shall require prior approval of the Federal Trade Commission for, or prohibit respondent from:

(a) Acquiring in a transaction (not part of a series of transactions involving the acquistion for $375,000 or more of all or part of a terminal) a terminal the acquisition price of which is not more than $375,000;

(b) Acquiring any gasoline stations from any party who neither owns nor operates all or part of a terminal on the island of the State of Hawaii where such gasoline station or stations are located and has neither owned nor operated a terminal on that island within two (2) years of the time of the proposed acquisition;

(c) Acquiring from any one party any of the following: (i) Not more than ten (10) gasoline stations on the Island of Oahu; (ii) not more than four (4) gasoline stations on the Island of Maui; (iii) not more than three (3) gasoline stations on the Island of Hawaii; (iv) not more than two (2) gasoline stations on the Island of Kauai; (v) not more than one (1) gasoline station on the Island of Molokai;

(d) Leasing or contracting for the use of the petroleum products capacity of a terminal, provided that the lease or contract does not have the effect of excluding others from the use of 50 percent of the petroleum products capacity of the terminal;

(e) Making any lease or contract for the use of a terminal where neither the owner nor operator of that terminal has owned within two (2) years of the lease or contract any gasoline stations located on the same island as the terminal; or

(f) Making any lease or contract for the use of a terminal where the owner and the operator retains ownership of at least the same number of gasoline stations that it owns on the same island as the terminal for at least five (5) years after the lease or contract is consummated.

III.

One (1) year from the date this Order becomes final and annually thereafter, respondent shall file with the Commission a verified written report of its compliance with this Order, as well as a summary of the date, parties, location, volumes, duration and terms of each agreement respondent entered during the year concerning (i) any acquisition or lease from another party of a gasoline station in the state of Hawaii, (ii) any acquisition of a terminal in the state of Hawaii, and (iii) any arrangement that provides respondent with petroleum product storage at a terminal in the state of Hawaii not owned or operated by respondent, including exchange agreements, throughput agreements, leases or similar arrangements.

IV.

Nothing in this Order shall apply to, require Federal Trade Commission prior approval for the exercise of, or otherwise limit the respondent's rights under any terminalling or other agreement in effect prior to the date this Order becomes final, or to any extension of these rights if the assets, capacity, and throughput (as appropriate) available to respondent do not increase as a result of such extension.

V.

For the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent made to its principal offices, respondent shall permit any duly authorized representatives of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this Order; and

2. Upon five (5) days' notice to respondent and without restraint or interference from them, to interview officers or employees or respondent, who may have counsel present, regarding such matters.

VI.

It is further ordered that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure that may affect compliance obligations arising out of this Order including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change.

The Federal Trade Commission ("Commission") has accepted for public comment from Pacific Resources, Inc. ("PRI"), an agreement containing consent order in settlement of a Complaint challenging the proposed 1987 acquisition of Shell Oil Company's ("Shell") petroleum products terminalling and distribution assets and operations in the Hawaiian Islands.[1] The Commission has withdrawn this matter from adjudication for the purpose of placing the agreement on the public record for sixty (60) days for reception of comments from interested persons.

Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and comments received, and will decide whether it should withdraw from the agreement or make final the agreement's Order.

The Commission has reason to believe that the proposed acquisition would have violated section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complaint alleges an anticompetitive effect in the marketing of gasoline and diesel fuel through terminals and retail service stations on the islands of Oahu, Hawaii, Mauai, Kauai and Molakai in the State of Hawaii.

The proposed Agreement Containing Consent Order ("Order") would, if issued by the Commission, settle the complaint. The Order would prohibit PRI from acquiring, without prior Commission approval, any substantial Hawaiian wholesale terminal from a competitor or from entering into any terminalling agreement (such as a long term lease) for more than fifty percent of the capacity of such a terminal. The Order would also circumscribe PRI's ability to acquire retail gasoline stations from its wholesale competitors.

The Order accepted for public comment contains provisions requiring Commission prior approval of the purchase of any petroleum products terminals over $375,000. Commission prior approval is also required for terminal agreements, leases or contractual arrangements that give PRI more than 50 percent of the capacity of a terminal. PRI is also limited in the number of retail service stations it can purchase at any one time from a particular purchaser on each island.

It is anticipated that the Order would resolve the competitive problems alleged in the complaint. The purpose of this analysis is to invite public comment concerning the consent Order, in order to aid the Commission in its determination of whether it should make final the order contained in the agreement.

This analysis is not intended to constitute an official interpretation of the agreement and Order, nor is it intended to modify the terms of the agreement and Order in any way.

Donald S. Clark,

Secretary.

[FR Doc. 88-19616 Filed 8-29-88; 8:45 am]

BILLING CODE 6750-01-M

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[1] The Complaint charges that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 and that the proposed acquisition, if completed, would violate section 7 of the Clayton Act, as amended, 15 U.S.C. 18. Shell was not named as a respondent in the Commission's Complaint.

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16 CFR Part 13

[File No. 861-0120]

Iowa Chapter of the American Physical Therapy Association; Proposed Consent Agreement with Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, the Iowa Chapter of the American Physical Therapy Association (ICAPTA), a professional association representing physical therapists in Iowa, from restricting any physical therapist from accepting or continuing employment with any physician, or declaring such employment illegal or unethical.

DATE: Comments must be received on or before October 31, 1988.

ADDRESS: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., NW., Washington DC 20580.

FOR FURTHER INFORMATION CONTACT: Janet Grady, San Francisco Regional Office, Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, CA 94103. (415) 995-5220.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(14) fo the Commission's Rules of Practice. (16 CFR 4.9(b)(14)).

List of Subjects in 16 CFR Part 13

Physical Therapists, Trade practices.

In the matter of Iowa Chapter of the American Physical Therapy Association, a

corporation. Agreement Containing Consent Order to Cease and Desist.

The Federal Trade Commission having initiated an investigation of certian acts and practices of the Iowa Chapter of the American Physical Therapy Association ("ICAPTA" or "proposed respondent"), and it now appearing that proposed respondent is willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated.

It is hereby agreed by and between proposed respondent, by its duly authorized officer, and its attorney, and counsel for the Federal Trade Commission that:

1. ICAPTA is a corporation, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal business address located at 1454 30th Street, Suite 201, West Des Moines, Iowa 50265.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:

a. Any further procedural steps;

b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

d. Any claim under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft of complaint here attached.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint attached may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

Proposed respondent has read the proposed complaint and order contemplated hereby. It understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

Order

I.

It is ordered that for purposes of this Order:

A. "Respondent" means the Iowa Chapter of the American Physical Therapy Association ("ICAPTA"), and its board of directors, officers, councils, committees, representatives, agents, employees, successors, and assigns.

B. "Employment or other contractual arrangement" means an employment or other contractual arrangement, written or unwritten, that is permitted under Iowa and federal law.

C. "Physical therapist" means any person licensed as a physical therapist by the State of Iowa.

II.

It is ordered that respondent shall cease and desist, directly or through any corporate or other device, from restricting, impeding, regulating, declaring unethical or illegal, interfering with, or advising against any physical therapist:

A. Accepting or continuing any employment or other contractual arrangement with any physician, or other health care provider because such physician or health care provider employs or seeks to employ, or has a contractual arrangement with, or seeks to enter into a contractual arrangement with any physical therapist; or

B. Referring patients to, or accepting referrals from, any physician or other health care provider because that physician or health care provider employs or seeks to employ, or has a contractual arrangement with, a physical therapist.

III.

It is further ordered that respondent shall cease and desist, directly or through any corporate or other device, from making, directly or by implication, any representation concerning the legality or illegality of any aspect of physical therapy practice unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for such representation.

IV.

It is further ordered that this Order shall not prohibit respondent from, in good faith, petitioning any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or participating in any federal or state administrative or judicial proceeding.

V.

It is further ordered that respondent shall within sixty (60) days after this Order becomes final:

A. Rescind all resolutions, and remove from any existing ICAPTA policy statements or guidelines, any provision, interpretation or policy statement which is inconsistent with the provisions of Part II of this Order; and

B. Publish a copy of this Order in the *ICAPTA Recap* or any successor publication, and for a period of three (3) years thereafter, annually publish a copy of the Notice attached hereto in the *ICAPTA Recap* or any successor publication.

VI.

It is further ordered that respondent shall:

A. Within ninety (90) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this Order; and

B. For a period of five (5) years after this Order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken by respondent in connection with the activities covered by this Order.

VII.

It is further ordered that the respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligation arising out of this order.

Notice

The Iowa Chapter of the American Physical Therapy Association ("ICAPTA") has entered into a consent agreement with the Federal Trade Commission. Under the terms of the agreement, ICAPTA is required to inform you that it is not unethical or illegal for a physical therapist to accept or continue employment with a physician or physician-owned physical therapy service.

Among other things, the consent agreement forbids any action by ICAPTA that would restrict physical therapists from:

—Accepting or continuing any lawful employment or contractual arrangement with a physician; or
—Making referrals to, or accepting referrals from a physician or other health care provider because that provider employs a physicial therapist.

It would also prohibit ICAPTA from making representations about the legality or illegality of any aspect of physical therapy practice without having a reasonable basis for such statements.

In entering into this consent agreement, ICAPTA has not admitted any liability, or agreed that any law has been violated.

You may obtain a copy of the consent agreement and of the complaint of the Federal Trade Commission from ICAPTA or from the Federal Trade Commission.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from the Iowa Chapter of the American Physical Therapy Association ("ICAPTA" or "proposed respondent"). ICAPTA is a professional association representing physical therapists in Iowa, and is a component society of the American Physical Therapy Association. The agreement with the proposed respondent would settle charges by the Federal Trade Commission that it violated Section 5 of the Federal Trade Commission Act by acting as a combination of at least some of its members, or conspiring with them, to restrict its members from competing among themselves and with physicians by accepting or continuing employment with physicians or physician-owned clinics.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The Complaint

A complaint has been prepared for issuance by the Commission along with the proposed order. It alleges that ICAPTA is a voluntary association of physical therapists comprising over 65% of the physical therapists licensed to practice in Iowa. It also alleges that ICAPTA's physical therapist members compete for patients among themselves, with other physical therapists, with physical therapy services owned by physicians, and with other health care providers in Iowa. The complaint alleges that the proposed respondent acted as a combination of at least some of its members, or conspired with them, to restrict competition. It alleges that ICAPTA did this by restricting or attempting to prevent members frm accepting or continuing employment with physicians or physical therapy services owned by physicians.

According to the complaint, the proposed respondent adopted and disseminated to its members a resolution stating that it was illegal and unethical for a physical therapist to work for a physician. The complaint alleges that ICAPTA learned shortly thereafter that such employment arrangements were not illegal, but did not provide this corrected information to its members. It also alleges that ICAPTA adopted a second resolution calling for the discipline of members who engaged in direct salary arrangements with physicians. In addition, it alleges that proposed respondent adopted other resolutions that communicated to members that employment by physicians was unethical and would subject the physical therapist to disciplinary action.

The complaint further alleges that the purposes or effects of the combination or conspiracy have been to restrain competition unreasonably and injure consumers in the following ways, among others:

A. By impeding competition among physical therapists, and between physician-owned physical therapy services and other physical therapy services;

B. By deterring physical therapists in Iowa from accepting employment by physicians and offering their services in conjunction with physicians' services;

C. By hindering the development of efficient forms of practice that may reduce costs by offering the combination of physician diagnosis, physical therapy treatment, and physician-physical therapist consultation at one location; and

D. By depriving consumers of their choice of provider and the convenience of obtaining physician services and physical therapy services at the same location.

The Proposed Consent Order

Part I of the proposed order provides definitions. Parts II and III of the proposed order describe the conduct that is prohibited. Part II prohibits proposed respondent from restricting, declaring unethical or illegal, or otherwise interfering with any physical therapist accepting or continuing any employment or other contractual arrangement with any physician, or other health care provider where the reason for the restriction is that the health care provider employs or seeks to employ physical therapists. It also prohibits ICAPTA from restricting, declaring unethical or illegal, or otherwise interfering with any physical therapist referring patients to, or accepting referrals from, any physician or other health care provider, where the reason for the restriction is that the health care provider employs or seeks to employ a physical therapist.

Part III of the proposed order prohibits proposed respondent from making, directly or by implication, any representation concerning the legality or illegality of any aspect of physical thereapy practice unless, at the time of the representation, it possesses and relies upon a reasonable basis for the representation.

Part IV provides that the proposed order does not prohibit proposed respondent from, in good faith, petitioning any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or participating in any federal or state administrative or judicial proceeding.

Part V of the proposed order requires ICAPTA to rescind any resolutions or policy statements that are inconsistent with the proposed order, and to publish in its newsletter a Notice summarizing the terms of the order. The Notice is attached to the proposed order.

Part VI requires that ICAPTA file a compliance report within 90 days after the proposed order becomes final, and for five years, permit Commission staff access to proposed respondent's records for compliance purposes. Part VII requires that the proposed respondent notify the Commission prior to a change in the association which may affect compliance with the order.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify its terms in any way.

Donald S. Clark,

Secretary.

[FR Doc. 88-19618 Filed 8-29-88; 8:45 am]

BILLING CODE 6750-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 240

[Release No. 33-6797, File No. S7-9-88; Release No. 34-26027, File No. S7-11-88]

Offshore Offers and Sales; Registration Requirements for Foreign Broker-Dealers

AGENCY: Securities and Exchange Commission.

ACTION: Extension of comment period.

SUMMARY: The Securities and Exchange Commission is extending from September 15 to October 31, 1988, the date by which comments on Securities Act Release No. 33-6779 (June 17, 1988) [53 FR 22661] regarding offshore offers and sales of securities must be submitted. The Commission also is extending from September 15 to October 31, 1988, the date by which comments on Securities Exchange Act Release No. 34-25801 (June 23, 1988) [53 FR 23645] concerning registration requirements for foreign broker-dealers must be submitted.

DATE: Comments on Release No. 33-6779 and Release No. 34-25801 must be received on or before October 31, 1988

ADDRESS: Comments on Release No. 33-6779 and Release No. 34-25801 should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comment letters on Release No. 33-6779 should refer to File No. S7-9-88, and comment letters on Release No. 34-25801 should refer to File No. S7-11-88. All comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Sara Hanks or Samuel Wolff, (202) 272-3246, Office of International Corporate Finance, Division of Corporation Finance; John Polanin, Jr., (202) 272-2848, Office of Legal Policy, Division of Market Regulation; Securities Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: In Securities Act Release No. 33-6779, the Commission requested written comments on proposed Regulation S. Proposed Regulation S is intended to clarify the extraterritorial application of the registration provisions of the Securities Act of 1933. In order to receive the benefit of comments from the greatest number of interested persons, and it permit commentators to assess the proposal in light of the Commission's planned Rule 144A initiative, the Commission is extending the comment period for Securities Act Release No. 33-6779 from September 15 to October 31, 1988.

In Securities Exchange Act Release No. 34-25801, the Commission requested written comments on proposed Rule 15a-6 and the accompanying interpretive statement concerning registration requirements for foreign broker-dealers. When issuing Releases No. 33-6779 and No. 34-25801, the Commission decided that both comment periods should run concurrently; therefore, the Commission also is extending the comment period for Release No. 34-25801 from September 15 to October 31, 1988.

By the Commission.

Jonathan G. Katz,

Secretary.

August 24, 1988

[FR Doc. 88-19697 Filed 8-29-88; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 81

[Docket No. 76N-0366]

Provisional Listing Of FD&C Red No. 3 In Cosmetics And Externally Applied Drugs, And Of Its Lakes In Food, Drugs, And Cosmetics; Proposal To Extend Closing Date

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to postpone the closing date for the provisional listing of FD&C Red No. 3 for use in coloring cosmetics and externally applied drugs and of the lakes of this color additive for use in coloring food, drugs, and cosmetics. The new closing date for the provisional listing of this color additive will be June 30, 1989. This postponement will provide additional time for FDA to receive and evaluate new information on FD&C Red No. 3 and to prepare appropriate **Federal Register** documents for the regulation of this color additive.

DATE: Comments by September 29, 1988.

ADDRESS: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Gerad L. McCowin, Center for Food Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5676.

SUPPLEMENTARY INFORMATION:

I. Background

The Color Additive Amendments of 1960 (the amendments) established a system of premarket approval for all color additives used in foods, drugs, and cosmetics. Recognizing that many color additives were already in use at the time the amendments were enacted, Congress also established transitional provisions to allow for the provisional listing and continued use of those color additives while the studies necessary to determine whether they should be permanently listed under the standards established in the amendments were conducted and evaluated.

Section 81.1 (21 CFR 81.1) of the color additive regulations designates those color additives that are provisionally listed under section 203(b) of the transitional provisions of the amendments (Title II, Pub. L. 86–618, 74 Stat. 404–407 (21 U.S.C. 376, note)), along with their respective closing dates. A "closing date" is the last day upon which a provisionally listed color additive can be legally used, absent approval of a color additive petition and the permanent listing of the color additive.

A color additive may be permanently listed only if data establish that it is safe under its intended conditions of use. The transitional provisions permit the provisional listing of color additives for a period of time necessary to complete scientific investigations needed to establish their safety. The closing date for such color additives can be extended if, in the Commissioner's judgment, the scientific investigations are going forward in good faith and will be completed as soon as reasonably practicable, and if the postponement is consistent with the public health. See *McIlwain* v. *Hayes*, 690 F.2d 1041, 1047 (DC Cir. 1982), and *Public Citizen* v. *Department of Health and Human Services*, 831 F.2d 1108, 1122 (DC Cir. 1987).

II. Status Of FD&C Red No. 3

As one of the conditions of the continued provisional listing of FD&C Red No. 3, FDA required on February 4, 1977 (42 FR 6992) that the petitioners perform long-term feeding studies in rats and mice. The data from these studies were evaluated by FDA scientists and by the National Toxicology Program (NTP), Board of Scientific Counselors Technical Reports Review Subcommittee. Both groups of scientists concluded that the rat study showed a treatment-related increased incidence of male rats bearing thyroid follicular cell tumors at the highest feeding level.

Following this finding by agency and NTP scientists, the sponsors of the color additive provided additional data, from short-term studies, to support their contention that the thyroid tumors observed in the test animals resulted from the operation of a secondary mechanism. The sponsors hypothesized that the tumors were caused by hormonal imbalances resulting from ingestion of high levels of FD&C Red No. 3 and thus were not caused directly by ingestion of the color additive. The sponsors further contended that, if a secondary mechanism exists, a threshold or "no-effect" level might be established that would permit use of the color additive. This issue is discussed in greater detail in the proposal and final rule to postpone the closing date for FD&C Red No. 3 (and other color additives) which was published in the **Federal Register** of June 26, 1985 (50 FR 26377), and September 4, 1985 (50 FR 35873), respectively.

The agency concluded that there was some reason to believe that FD&C Red No. 3 may operate through a secondary mechanism, and enlisted the aid of an expert panel of Government scientists to consider the issue. The Commissioner charged the panel to consider whether the data indicate that a secondary mechanism of action exists; if not, what further studies would resolve the issue; and what human health concerns would be posed by continued use until the questions were resolved. Because of the complexity of the issues, the agency again extended the closing date for FD&C Red No. 3, and the extension through November 3, 1987, was upheld in *Public Citizen* v. *Department of Health and Human Services, supra.*

The panel submitted its report in July, 1987. (Availability of the panel report for public review was announced in the **Federal Register** of August 11, 1987 (52 FR 29728). The panel concluded, among other things, that FD&C Red No. 3 "is a rat oncogen with equivocal evidence of carcinogenicity and with some evidence for causing benign thyroid tumors;" that although the panel could not come to any definitive conclusion concerning the exact mechanism by which FD&C Red No. 3 induced thyroid tumors in rats, the color additive's tumorigenic effect "is more likely to be the result of an indirect (secondary) mechanism;" and that if it is assumed that the color additive poses a tumorigenic risk to humans, "the risk from ingesting [FD&C Red No. 3] containing food and drugs is small, that is, the number of people with [FD&C Red No. 3] induced tumors would be too small to be observed by epidemiologic or other human studies." The panel suggested some studies that could be conducted to investigate further the mechanisms of action of FD&C Red No. 3.

The panel also conducted a number of assessments of acceptable daily intake for the color additive. Based on the panel's report, the agency oncluded that it may be necessary to limit the aggregate uses of FD&C Red No. 3 in food, drugs, and cosmetics. To that end, the agency published notices in the **Federal Register** of November 19, 1987 (52 FR 44485), and December 21, 1987 (52 FR 48326), requesting data on the sale and use of FD&C Red No. 3 from persons interested in the continued use of the color additive. The sale and use data were to be submitted by February 21, 1988.

FDA has carefully studied the panel report, and has allowed time for the affected industry and the public to study the report. In the meantime, the agency has extended the provisional listing of FD&C Red No. 3 to August 30, 1988. See 53 FR 25127 (July 1, 1988). The agency has begun to evaluate the data on the sale and use of the color additive that have been submitted by the industry. The agency has as yet been unable to reach a conclusion as to whether FD&C Red No. 3 operates by a secondary mechanism of action. However, the Certified Color Manufacturers' Association (CCMA) has informed FDA, by letter dated June 14, 1988, that it has initiated a rat study designed to "demonstrate that FD&C Red No. 3 produces an increase in serum thyrotropin (TSH) concentrations, and that there is a threshold for this effect." CCMA asserted that the results of this study, along with other information it had supplied, will demonstrate that FD&C Red No. 3 has no direct effect on the thyroid, i.e., that it operates through a secondary mechanism. The association further stated that a final report for the study is expected in November 1988.

FDA has evaluated the protocol for the study that is being conducted by CCMA, and has concluded that the study does address the issue of the mechanism of action of FD&C Red No. 3, and therefore may produce results that are relevant to that issue.

III. Conclusions

FDA believes that it is appropriate to postpone the closing date for the provisional listing of FD&C Red No. 3, so that the agency can consider the results of the CCMA study, as well as the sale and use data, before making a final decision with respect to the status of FD&C Red No. 3 under the color additive amendments. Adequate time will be required for the agency to complete its evaluation of the data from the CCMA study, and of the sale and use data, as well as for preparation of final **Federal Register** documents. The agency has concluded that these activities can be accomplished by June 30, 1989.

Based on the circumstances described above, including communications between agency scientists and the petitioner, the Commissioner concludes that the scientific tests for making a determination as to the permanent listing of FD&C Red No. 3 are being carried forward in good faith and will be completed as soon as reasonably practicable. Similarly, based upon his evaluation of the available data, the Commissioner concludes that extension of the closing date to June 30, 1989, is consistent with the public health and therefore is in compliance with *McIlwain* v. *Hayes* and *Public Citizen* v. *Department of Health and Human Services, supra.* In addition to the reasons stated above, the Commissioner bases his conclusion on, among other things, the limited uses covered by the provisional listings. As the Commissioner noted in the proposed postponement of the closing date in 1985, terminating the provisional listing before making a decision with respect to the uses of FD&C Red No. 3 that are permanently listed would be an "unnecessary and inappropriate exercise in formalism." (50 FR 26377 at 26380 (June 26, 1985)).

IV. Environmental and Economic Impact

The agency has determined under 21 CFR 25.24(a)(8) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

FDA has determined that extending the provisional listing of these color additives requires no change in the current industry practice concerning the manufacture or use of these ingredients. Therefore, FDA certifies, in accordance with section 605(b) of the Regulatory Flexibility Act, that no significant economic impact on a substantial number of small entities will derive from this action. Further, the economic effects of this proposed rule have been analyzed and it has been determined that it is not a major rule as defined by Executive Order 12291.

V. Comments

In accordance with 21 CFR 10.40(b)(2), FDA is providing 30 days for comment on this proposal. The current closing date for the provisional listing of this color additive is August 30, 1988. Because of the closeness of the closing date, it is necessary for the agency to shorten the comment period on this proposal. Therefore, there is good cause for providing 30 days, rather than 60 days, for comment.

Interested persons may, on or before September 29, 1988, submit to the Dockets Management Branch (address above) written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 81

Color additives, Color additives provisional list, Cosmetics, Drugs.

Therefore, under the Transitional Provisions of the Color Additive Amendments of 1960 to the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that Part 81 be amended as follows:

PART 81—GENERAL SPECIFICATIONS AND GENERAL RESTRICTIONS FOR PROVISIONAL COLOR ADDITIVES FOR USE IN FOODS, DRUGS, AND COSMETICS

1. The authority citation for 21 CFR Part 81 continues to read as follows:

Authority: Secs. 701, 706, 52 Stat. 1055–1056 as amended, 74 Stat. 399–407 as amended (21 U.S.C. 371, 376); Title II, Pub. L. 86–618; sec. 203, 74 Stat. 404–407 (21 U.S.C. 376, note); 21 CFR 5.10.

§ 81.1 [Amended]

2. Section 81.1 *Provisional lists of color additives* is amended in the table of paragraph (a) by revising the closing date for the entry "FD&C Red No. 3" to read "June 30, 1989."

§ 81.27 [Amended]

3. Section 81.27 *Conditions of provisional listing* is amended in the table, appearing in the introductory text of paragraph (d), by revising the closing date for the entry "FD&C Red No. 3" to read "June 30, 1989."

Dated: August 23, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88–19540 Filed 8–29–88; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. S–012A]

Control of Hazardous Energy Sources (Lockout/Tagout); Change of Hearing Date

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of change of date for hearing.

SUMMARY: On August 9, 1988 (53 FR 29920, OSHA announced an informal public hearing on the proposed standard for the control of hazardous energy (lockout/tagout). (The proposal was published on April 19, 1988, at 53 FR 15496.) As indicated in the August 9, 1988 **Federal Register** notice, the hearing will begin in Washington, DC on September 22, 1988, and was to reconvene in Houston, Texas, September 27–28, 1988. However, the portion of the hearing to be held in Houston has been rescheduled from September 27–28, 1988, to October 12–13, 1988, to allow greater public participation. Procedural requirements for submission of written comments, and for participation in the hearing, are set forth in the August 9, 1988 **Federal Register** notice.

DATES: The hearing will begin in Washington, DC, on September 22, 1988, at 9:30 a.m., and may continue for more than one day based on the number of notices of intention to appear. Once all parties who wish to do so have testified in Washington, DC, the hearing will be recessed and reconvened in Houston, Texas, on October 12, 1988, at 9:30 a.m., for the receipt of testimony of those parties who prefer to testify at that location. Notices of intention to appear at the public hearing and testimony and evidence to be introduced into the record must be postmarked by September 8, 1988. Written comments on the issues raised in this notice must be postmarked by September 22, 1988.

ADDRESSES: The informal public hearing will begin in the Auditorium, Frances Perkins Department of Labor Building, 200 Constitution Avenue NW., Washington, DC 20210. The hearing will be reconvened at the Guest Quarters Suite Hotel; 5353 Westheimer Road; Houston, Texas (713–961–9000).

Four copies of written comments must be sent to the Docket Office, Docket No. S–012A; U.S. Department of Labor, Occupational Safety and Health Administration; Room N3439 Rear; 200 Constitution Avenue NW.; Washington, DC 20210.

Four copies of each notice of intention to appear and testimony and evidence that will be introduced into the hearing record must be sent to: Mr. Tom Hall; U.S. Department of Labor, Occupational Safety and Health Administration; Room N3647; 200 Constitution Avenue NW.; Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: *Hearing:* Mr. Tom Hall; U.S. Department of Labor, Occupational Safety and Health Administration; Room N3647; 200 Constitution Avenue NW.; Washington, DC 20210 (202–523–8615).

Proposal: Mr. James F. Foster; U.S. Department of Labor, Occupational Safety and Health Administration; Room N3647; 200 Constitution Avenue

NW.; Washington, DC, 20210 (202–523–8148).

Authority: This document was prepared under the direction of John A. Pendergrass, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

It is issued pursuant to Section 6(b) of the Occupational Safety and Health Act of 1970 (84 Stat. 1593, 29 U.S.C. 655); Secretary of Labor's Order No. 9–83 (48 FR 35736); and 29 CFR Part 1911.

Signed at Washington, DC, this 24th day of August, 1988.

John A. Pendergrass,

Assistant Secretary of Labor.

[FR Doc. 88–19582 Filed 8–29–88; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

Surface Coal Mining and Reclamation Operations Under the Federal Lands Program; State-Federal Cooperative Agreements; Ohio

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Proposed rule.

SUMMARY: OSMRE is proposing to amend the cooperative agreement between the Department of the Interior and the State of Ohio for the regulation of surface coal mining and reclamation operations on Federal lands in Ohio. This cooperative agreement is authorized under section 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendments would authorize the State of Ohio to regulate coal exploration activities and the surface effects of underground mining on Federal lands in Ohio. 30 CFR 745.14 provides for amendments to cooperative agreements of this type.

This notice sets forth the times and locations that the proposed amendments to the cooperative agreement will be available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendments, and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received on or before 4:00 p.m. on September 29, 1988. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. on September 26, 1988. Requests to present oral testimony at the hearing must be received on or before 4:00 p.m. on September 14, 1988.

ADDRESSES: Written comments and requests to testify at the hearing should be mailed or hand delivered to Ms. Nina Rose Hatfield, Director, Columbus Field Office, at the address listed below. Copies of the Ohio program, the proposed amendments, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive, free of charge, one copy of the proposed amendments by contacting OSMRE's Columbus Field Office.

Office of Surface Mining Reclamation and Enforcement, Columbus Field Office, 2242 South Hamilton Road, Room 202, Columbus, Ohio 43232, Telephone: (614) 866–0578

Office of Surface Mining Reclamation and Enforcement, 1100 "L" Street, NW., Room 5131, Washington, DC 20240, Telephone: (202) 343–5492

Ohio Department of Natural Resources, Division of Reclamation, Fountation Square, Building B–3, Columbus, Ohio 43224, Telephone: (614) 265–6675

FOR FURTHER INFORMATION CONTACT: Ms. Nina Rose Hatfield, Director, Columbus Field Office, (614) 866–0578.

SUPPLEMENTARY INFORMATION:

I. Background

On March 26, 1982, the State of Ohio requested a cooperative agreement between the Department of the Interior and the State of Ohio to give the State primacy in the administration of its approved regulatory program on Federal lands in Ohio. The Secretary approved the cooperative agreement on February 22, 1984. Approval of the cooperative agreement was published on April 13, 1984 (49 FR 14735). The text of the existing cooperative agreement can be found at 30 CFR 935.30.

The approved cooperative agreement signed by the Secretary and the State of Ohio does not contain specific language regarding coal exploration or the surface effects of underground mining on Federal lands in Ohio. On April 26, 1988, OSMRE sent a letter to the State outlining proposed amendments to the cooperative agreement to include this language and to make other minor changes regarding reference to an appendix to the agreement. In a letter dated May 13, 1988, the State of Ohio indicated that the proposed changes were acceptable to the State.

II. Discussion of the Proposed Amendments

The proposed amendments would modify the following sections of the cooperative agreement:

1. *Article I.A. Authority:* The proposed amendments would include surface effects resulting from underground mining operations under the mining and reclamation activities which the State would regulate.
2. *Article I.A. Authority:* The proposed amendments would include coal exploration operations not subject to 43 CFR Part 3480, subparts 3480 through 3487, under the mining and reclamation activities which the State would regulate.
3. *Article VI. Review of a Permit Application Package:* The proposed amendments would include coal exploration operations under the State's permit application review responsibilities.
4. *Article XV. Reservation of Rights:* The proposed amendments would revise this Article and incorporate a reference to the laws listed in Appendix A. The revised Article would read as follows:

"In accordance with 30 CFR 745.13, this agreement shall not be construed as waiving or preventing the assertion of any rights that have not been expressly addressed in this agreement that the State or the Secretary may have under other laws or regulations, including but not limited to those listed in Appendix A."

5. *Appendix A:* The proposed amendments would add an Appendix A, which would contain the list of applicable Federal and State laws and regulations referenced in item 4.

III. Public Comment Procedures

OSMRE is now seeking comments on the proposed amendments. If the amendments are deemed adequate, they will become part of the cooperative agreement between the Department of the Interior and the State of Ohio.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "**DATES**" or at locations other than the Columbus Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under **"FOR FURTHER INFORMATION CONTACT"** by 4:00 p.m. on September 14, 1988. If no one requests an opportunity to comment at a public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSMRE officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment and who wish to do so will be heard following those scheduled. The hearing will end after all persons scheduled to comment and persons present in the audience who wish to comment have been heard.

Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meeting with OSMRE representatives to discuss the proposed amendments may request a meeting at the Columbus Field Office by contacting the person listed under **"FOR FURTHER INFORMATION CONTACT."** All such meetings shall be open to the public and, if possible, notices of the meetings will be posted at the locations listed under **"ADDRESSES."** A written summary of each public meeting will be made a part of the Administrative Record.

List of Subjects in 30 CFR Part 935

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Date: August 19, 1988.

Carl C. Close,

Assistant Director, Eastern Field Operations.

[FR Doc. 88-19619 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 58

[DoD Instruction 1400.xx]

Compliance With Host Nation Human Immunodeficiency Virus (HIV) Screening Requirements for DoD Civilian Employees

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: Some countries require DoD civilian employees be screened for the Human Immunodeficiency Virus (HIV) before they may enter the country. DoD is obligated to comply with such requirements. HIV is the virus associated with the Acquired Immune Deficiency Syndrome (AIDS). To assure the consistent observance of these requirements and the proper treatment of its employees, the Department of Defense proposes to issue this Part. It establishes a single approval authority and uniform policies and procedures. It also provides guidance for personnel administration and protection of employees' rights. The proposed Part would not apply to employees of organizations or business concerns under contract to DoD, nor to dependents or family members of DoD military and civilian personnel. The policy would apply to those members of the general public who apply for and have been tentatively selected for DoD civilian employment in a host nation that requires HIV screening.

DATE: Submit written comments on or before September 29, 1988.

ADDRESS: Send comments to the Director, Workforce Relations, Training and Staffing Policy, Office of the Deputy Assistant Secretary of Defense (Civilian Personnel Policy), Washington, DC 20301-4000.

FOR FURTHER INFORMATION CONTACT: Thomas W. Hatheway, telephone (202) 695-2012.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 58

Foreign relations, Civilian employees.

Accordingly, it is proposed that Title 32, Chapter I of the Code of Federal Regulations be amended to add Part 58 as follows:

PART 58—COMPLIANCE WITH HOST NATION HUMAN IMMUNODEFICIENCY VIRUS (HIV) SCREENING REQUIREMENTS FOR DoD CIVILIAN EMPLOYEES

Sec.
58.1 Purpose.
58.2 Applicability ans scope.
58.3 Definitions.
58.4 Policy.
58.5 Responsibilities.
58.6 Procedures.

Authority: 10 U.S.C. 113 and 5 U.S.C. 301.

§ 58.1 Purpose.

This part establishes policies and procedures for screening DoD civilian employees for Human Immunodeficiency Virus (HIV) and for the use of screening results.

§ 58.2 Applicability and scope.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Organization of the Joint Chiefs of Staff (OJCS), the Unified and Specified Commands, the Inspector General of the Department of Defense (IG, DoD), and the Defense Agencies (hereafter referred to collectively as the "DoD Components").

§ 58.3 Definitions.

(a) *Human Immunodeficiency Virus (HIV).* The virus associated with the Acquired Immune Deficiency Syndrome (AIDS).

(b) *Host Nation.* A foreign nation to which DoD U.S. citizen employees are assigned to perform their official duties.

(c) *DoD Civilian Employees.* For purposes of this part this term includes current and prospective DoD U.S. citizen employees. It includes both appropriated and nonappropriated fund personnel. It does not include employees of or applicants for positions with private sector contractors performing work on behalf of the Department of Defense.

§ 58.4 Policy.

It is the policy of the Department of Defense to comply with operational host nation requirements for HIV screening of DoD civilian employees.

§ 58.5 Responsibilities.

(a) The Assistant Secretary of Defense (ASD(FM&P)) shall establish policies governing HIV screening of DoD civilian employees assigned to host nations, in coordination with the Assistant Secretary of Defense (Health Affairs) (ASD(HA)), the Assistant Secretary of Defense (International Security Affairs) (ASD(ISA)), and the DoD General Counsel.

(b) The ASD(ISA) shall identify or confirm host nation HIV screening requirements for DoD civilian employees, and coordinate requests for screening with the Department of State.

(c) Heads of DoD Components shall implement HIV screening policies for DoD civilian employees assigned to overseas areas. Included in this responsibility are the following actions:

(1) Reporting newly established host nation HIV screening requirements to the ASD(FM&P) and providing sufficient background information to support a decision.

(2) Developing and distributing policy implementing instructions.

(3) Establishing procedure to notify individuals who are evaluated as HIV seropositive and providing initial counseling to them.

§ 58.6 Procedures.

(a) Requests for authority to screen DoD employees for HIV shall be directed to the ASD(FM&P). Only those requests will be accepted which are based upon an operational host nation HIV screening requirement. Requests based upon other concerns, such as sensitive foreign policy or medical health care issues, will not be considered under this policy. Approvals will be provided by ASD(FM&P) memorandum.

(b) HIV screening shall be considered a requirement imposed by another nation that must be met prior to final decision to select the individual for a position or prior to approving temporary duty or detail to the host nation. Thus, the Department of Defense has made no official commitment concerning overseas positions to those individuals who refuse to cooperate with the screening requirements or those who cooperate and are diagnosed as HIV seropositive.

(c) Those who refuse to cooperate with the screening requirement shall be treated as follows:

(1) Those who volunteered for the assignment, whether permanent or temporary in nature, shall be returned to their official position without further action and without prejudice with respect to employee benefits, career progression opportunities, or any other personnel actions.

(2) Those who are obligated to accept assignment to the host nation under the terms of an employment agreement, regularly scheduled tour of duty, or similar, prior obligation, may be subjected to an appropriate adverse personnel action under the specific terms of the employment agreement, or other authorities that may apply.

(d) Those who accept the screening and are evaluated as HIV seropositive may be denied the assignment on the basis that evidence of seronegativity is required by the host nation. Such employees shall be returned to their current positions without prejudice. They shall be given proper counseling and shall retain all the rights and benefits to which they are entitled including accommodations for the handicapped as provided in the ASD(FM&P) Memorandum dated January 22, 1988,[1] Federal Personnel Manual Bulletin 792–42, and 29 USC 784. Non-DoD employees should be referred to appropriate support service organizations.

(e) Some host nations may not bar entry to HIV seropositive DoD employees may require reporting such individuals to host nation authorities. In such cases DoD civilian employees who are evaluated as HIV seropositive shall be informed of the reporting requirement. They shall be counseled and given the option of declining the assignment and being returned to their official positions without prejudice.

(f) A positive confirmatory test by Western blot must be accomplished on an individual if the screening test (ELISA) is positive. A civilian employee shall not be identified as HIV antibody positive unless the confirmatory test (Western blot) is positive. The clinical standards contained in ASD(HA) Memorandum dated September 11, 1987,[2] shall be observed during initial and confirmatory testing.

(g) Procedures shall be established by DoD Components to protect the confidentiality of test results for all individuals, consistent with ASD(FM&P) Memorandum dated January 22, 1988 and 32 CFR Part 286a.

(h) Tests shall be provided by the DoD Components at no cost to the employee or applicant.

(i) Employees infected with HIV shall be counseled in accordance with the Secretary of Defense Memorandum dated April 20, 1987.[3]

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

August 25, 1988.

[FR Doc. 88–19708 Filed 8–29–88; 8:45 am]

BILLING CODE 3810-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[FRL–3436–9]

Hazardous Waste Management System, Identification and Listing of Hazardous Waste; New Data and Use of These Data Regarding the Establishment of Regulatory Levels for the Toxcity Characteristic; and Use of the Model for the Delisting Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of data availability and request for comments; supplement to proposed rule; extension of comment period.

SUMMARY: The purpose of this notice is to extend the public comment period on the supplement to the Toxicity Characteristic proposed rule and use of the ground water model for the Delisting Program, which appeared in the **Federal Register** on August 1, 1988 (53 FR 28892) and would amend the hazardous waste identification regulations under Subtitle C of the Resource Conservation and Recovery Act. Specifically, the Agency will acept comments until September 22, 1988.

EPA received several requests for an extension of the comment period. To ensure that commenters have adequate time to prepare their comments, we are taking this opportunity to lengthen the comment period by 22 days, from August 31 to September 22, 1988.

DATES: The deadline for submitting written comments on the August 1, 1988 notice is extended from August 31, 1988 to September 22, 1988.

ADDRESSES: The original and three copies of all comments, identified by the Docket Number F–88–TC3N–FFFFF, should be sent to the following address: EPA RCRA Docket [S–212], U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The EPA RCRA docket is located in the sub-basement area at the above address, and is open form 9:30 a.m. to 3:30 p.m. Monday through Friday, excluding Federal Holdiays. To review docket materials, members of the public must make an appointment by calling [202] 475–9327. Materials may be copied at a cost of $0.15/page.

FOR FURTHER INFORMATION CONTACT: For general informaion contact the RCRA Hotline by calling [800] 424–9346 toll-free, or [202] 382–3000. For information on specific aspects of this notice, contact Dr. Zubair Saleem [202] 382–4770, Office of Solid Waste [OS–330], U.S. Environmental Protection Agency, 401 M Street SW., Washington DC 20460.

Dated: August 23, 1988.

J.W. McGraw,

Acting Assistant Administrator for Solid Waste and Emergency Response.

[FR Doc. 88–19629 Filed 8–29–88; 8:45 am]

BILLING CODE 6560-50-M

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[1] Copies may be obtained from Director, Workforce Relations, Training and Staffing Policy, Office of the Deputy Assistant Secretary of Defense (Civilian Personnel Policy), Washington, DC 20301–4000.

[2] See footnote 1 to § 58.6(d).

[3] See footnote 1 to § 58.6(d).

FEDERAL MARITIME COMMISSION

46 CFR Part 580

[Docket No. 88-19]

Rule on Effective Date of Tariff Changes

AGENCY: Federal Maritime Commission.

ACTION: Proposed rule.

SUMMARY: The Commission proposes to amend its foreign tariff filing rules to require common carriers to publish in their tariffs a rule specifying that rates, rules and charges applicable to a given shipment must be those published and in effect on the date the cargo is received by the carrier or its agent (including a connecting inland carrier in the case of an intermodal through movement).

DATE: Comments due on or before October 14, 1988.

ADDRESS: Comments (Original and fifteen (15) copies) to:

Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573.

FOR FURTHER INFORMATION CONTACT: Robert G. Drew, Director, Bureau of Domestic Regulation, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573, (203) 523-5796.

SUPPLEMENTARY INFORMATION: On December 16, 1987, the Trans-Pacific Westbound Rate Agreement ("TWRA") filed a petition for rulemaking ("Petition") requesting that the Commission issue a regulation precluding the application of any carrier tariff rate, charge or rule (other than a destination charge) to cargo physically received by the carrier prior to the effective date of the tariff provision. TWRA proposes that the regulation specifically prescribe the date when a tariff rule or rate becomes applicable to any given shipment.

Notice of the Petition was published in the **Federal Register** on December 30, 1987 (52 FR 49205), providing interested parties the opportunity to submit responses to the Petition. Replies to the Petition were received from: the Asia North America Eastbound Rate Agreement ("ANERA"); Greece/United States Atlantic and Gulf Conference, Mediterranean North Pacific Coast Freight Conference, and South Europe/U.S.A. Freight Conference (filing jointly as the "Mediterranean Conferences"); Pacific Coast/Australia-New Zealand Tariff Bureau ("PANCON"); Ocean Star Container Line ("Ocean Star"); Forest Lines Inc. ("Forest Lines"); Tropical Shipping & Construction Ltd. ("Tropical Shipping"); International Association of NVOCCS ("IANVOCC"); and the Chemical Manufacturers Association ("CMA").

TWRA Petition

TWRA seeks to end "pocket rates," described by TWRA as a tariff practice whereby the carrier negotiates a rate, receives the cargo from the shipper, but thereafter publishes the agreed rate in its tariff after the transportation has begun. TWRA claims that, in effect, the carrier retains the agreed freight rate "in [its] pocket" until after it has secured the cargo for its own carriage. TWRA states that, at the present time, "pocket rate" practices are lawful under Commission tariff regulations.

TWRA claims that a tariff rule banning the use of "pocket rates" would directly serve the purposes which underlie the tariff filing requirement. TWRA states the rationale for its Petition as follows:

> [F]irst, it serves the statutory objective of treating similar shippers similarly by enabling shippers to know what their competitors are paying for ocean transport before themselves committing cargo to a carrier; second, it is designed to permit shippers to know what their own rate is in advance of handing over the cargo; third, if Carrier A has the lower rate and it is publically [sic] available this fact enables the shipper to ask Carrier B for a reduction based thereon and also enables Carrier B to verify the correctness of that claim; fourth, this principle serves fair competition by permitting carriers to note and rely upon the published rate filed by their competitors and to permit competitive responses to such rates in a timely manner that enables other carriers to compete for the cargo.

Equating the use of pocket rates to secret rebates, TWRA argues that the requested tariff regulation would promote rate stability and the certainty of rate application to particular shippers, enhancing fair competition while avoiding unlawful preferences as between shippers.

The regulation suggested by TWRA does, however, permit a later date for destination charges than for other tariff provisions. TWRA contends that "such later dates have traditionally been utilized, normally are not specific to particular commodities, and have not been found to have the adverse effects of 'pocket' rates. * * *"

Responses to the TWRA Petition

Comments supportive of the proposal were filed by ANERA, the Mediterrean Conferences, PANCON, and Ocean Star (a vessel operating common carrier ("VOCC") in the Austrailia-U.S. and Mediterranean-U.S. trades). These commenters note that current tariff filing practices permit the carrier to publish, after the transportation of the shipment has commenced, a tariff rate which would apply to that shipment. These parties assert that such tariff practices give rise to "secret" rates which are discriminatory as between shipper, and constitute an unfair method of competition as between carriers. While supportive of the need for a uniform rule on tariff effectiveness, the commenters differ on the precise "cut-off" date to be specified for tariff purposes.

Opposing comments were submitted by Tropical Shipping, Forest Line, IANVOCC, and CMA. These commenters contend that the proposed regulation is unnecessary and anti-competitive, as TWRA allegedly has shown no discrimination in fact to have resulted from the current, permissive tariff filing requirements as to rate effectiveness. However, even if discrimination does result, the commenters believe the dominant policy issue must be to permit the "immediate" effectiveness of all rate reductions to shippers, and to allow tariff "flexibility" for carriers to respond quickly to changing market conditions.

Discussion

The pertinent regulation, 46 CFR 580.5(d) [1] currently allows the carrier unilaterally to establish one or more effective dates for rating and compliance purposes, which dates may differ from the time at which the transportation process commences. A carrier's implementation of Tariff Rule 3 thus may operate to give effect to two rates applicable at the same time to the same commodity—one being the rate currently published and made effective in the carrier's tariff at the time of tender of the goods, and the second being an unpublished rate but one no less effective as to the cargo.

Section 8(a) of the Shipping Act of 1984, 46 U.S.C. app. 1707, requires each common carrier and conference to file with the Commission tariffs showing "all" its rates, charges, classifications, rules and practices between all points and ports on its own route and on any through transportation route that has been established. It is questionable whether this statutory obligation is met by a carrier transporting cargo subject to a rate which will not be tariffed until some later point in the cargo's journey, *e.g.* immediately prior to vessel loading. Such rate practices permit a future act of tariff publication to "relate back" to shipments already in transit, thereby imposing a new rate over the rate then applicable in the carrier's tariff.[3]

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[1] This regulation requires each carrier to publish tariff rules governing its practices on specified key subjects. As relevant, the regulation requires tariff notice of the following:

(3) Rate applicability rule. A clear and definite statement of the time at which a rate becomes applicable to any given shipment.

46 CFR 580.5(d)(3) (1987) (hereinafter referred to as "Tariff Rule 3"). Commission requirements in this regard have remained virtually unamended since 1975.

In the hiatus between agreement upon the commodity rate and its subsequent publication, the unpublished (but agreed to) rate remains for all intents a secret rate between shipper and carrier. Only that shipper privy to the rate agreement can directly access the rate, *i.e.* tender cargo in the knowledge of the retroactive effect to be extended by the carrier to the new rate under Tariff Rule 3. Such a result appears to defeat the basic purpose of tariff filing. *See, e.g., Ghiselli Bros. v. Micronesia Interocean Line Inc.* 13 F.M.C. 179, 181 (1969).

The Commission proposes to address the issue of "pocket rate" practices by prescribing an effective date for rating purposes which is uniform and consistent with the date on which the carrier assumes its contractual and regulatory obligations with respect to the transportation, *i.e.*, beginning with delivery of the cargo to the carrier for shipment. The regulation here proposed is intended to foreclose a potential avenue for *post hoc* ratemaking, in order to avoid discriminatory effects vis-a-vis shippers and carriers, and to maintain the integrity of the tariff filing system.

The proposed rule does not include TWRA's suggestion as to destination charges. An exception for such charges could threaten objective or uniform application of carrier rates and charges. Moreover, such exception could shift the focus of any unauthorized ratemaking from the initial stages of the transportation to the discharge stage.

The Commission has determined that this regulation is not a "major rule" as defined in Executive Order 12291 dated February 27, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Commission finds that the proposed rule is exempt from the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601. Section 601(2) of the Act excepts from its coverage any "rule of particular applicability to rates or practices relating to such rates * * *". As the proposed rule relates to particular applications of rates and rate practices, the Regulatory Flexibility Act requirements are inapplicable.

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act, 44 U.S.C. 3504(h). Comments on the information collection aspects of this rule should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Federal Maritime Commission.

List of subjects in 46 CFR Part 580

Maritime carriers; Rates and fares; Reporting and record keeping requirements.

Therefore, pursuant to 5 U.S.C. 553; secs. 8, 9, 10 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1707, 1708, 1709, and 1716, the Federal Maritime Commission proposes to amend part 580 of Title 46 of the Code of Federal Regulations as follows:

PART 580—[AMENDED]

1. The authority citation for Part 580 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702–1705, 1707–1709, 1712, 1714–1716 and 1718.

2. In § 580.5 revising paragraph (d)(3) to read as follows:

§ 580.5 Tariff contents

* * * * *

(d) * * *

(3) Effective date rule. All tariffs shall provide that the tariff rates, rules and charges applicable to a given shipment must be those published and in effect when the cargo is received by the ocean carrier or its agent (including originating carriers in the case of rates for through transportation).

* * * * *

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 88–19693 Filed 8–29–88; 8:45 am]

BILLING CODE 6730-01-M

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[3] By analogy, Commission tariff regulations currently prohibit the publication of any rate which would "duplicate or conflict with" existing rates in the same tariff on the same commodity, 46 CFR 580.6(k)(1).

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 88–383, RM–6337]

Radio Broadcasting Services; Hinesville, GA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by E. D. Steele, Jr., proposing to allot Channel 284A to Hinesville, Georgia, as its second FM service. Coordinates for Channel 284A are 31–50–59 and 81–36–11.

DATES: Comments must be filed on or before October 7, 1988, and reply comments on or before October 24, 1988.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Anne Thomas Paxson, Borsari & Paxson, 2100 M Street, NW, Suite 610, Washington, DC 20037. (Attorney for petitioner).

FOR FURTHER INFORMATION CONTACT: Montrose H. Tyree, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the commission's Notice of Proposed Rule Making, MM Docket No. 88–383, adopted July 6, 1988, and released August 16, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1208. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-19612 Filed 8-29-88; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 88-384, RM-6102]

Radio Broadcasting Services; Fort Myers Beach, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by Justice Broadcasting—Fort Myers Beach, Inc., licensee of Station WQEZ(FM), Fort Myers Beach, Florida proposing the substitution of Channel 257C2 for Channel 257A at Fort Myers Beach, and the modification of its Class A license accordingly, coordinates 26-25-30 and 82-04-30.

DATES: Comments must be filed on or before October 7, 1988, and reply comments on or before October 24, 1988.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Melodie A. Virtue, Haley, Bailer & Potts, 2000 M Street NW., Suite 600, Washington, DC 20036 (attorney for petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-384, adopted July 12, 1988, and released August 16, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Docket Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. This is a restricted notice and comment rule-making proceeding. *See* 47 CFR 1.1208. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-19614 Filed 8-29-88; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 88-312; RM-6127; RM-6135]

Radio Broadcast Services; Pearl and Magee, MS; Correction

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; correction.

SUMMARY: This action corrects the comment and release dates of the Proposed Rule in this proceeding concerning FM channel allotments for Pearl and Magee, MS.

DATES: Comments are now due on the Proposal by October 17, 1988 and replies by November 1, 1988. In addition, the release date of the full text, mentioned under the "Supplementary Information" portion of the Preamble, is corrected to read: August 25, 1988.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, (202) 634-6530.

SUPPLEMENTARY INFORMATION: The Notice of Proposed Rule Making was published on July 29, 1988 at 53 FR 28673. Due to an oversight, notice of the action was never distributed. As a result, the comment/reply comment dates, as well as the official release date of the full text, are corrected as shown above.

H. Walker Feaster III,

Acting Secretary.

[FR Doc. 88-19606 Filed 8-29-88; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 88-75; RM-5334]

Television Broadcasting Services; Panama City, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal of.

SUMMARY: The Commission hereby dismisses the request of Nolan Ball, proposing the allotment of UHF television Channel *68 to Panama City, Florida for noncommercial educational use. With this action, this proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 88-75, adopted July 14, 1988, and released August 12, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The Complete test of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140 Washington, DC 20037.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-19613 Filed 8-29-88; 8:45 am]

BILLING CODE 6712-01-M

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 548 and 552

[GSAR Notice 5-257]

General Services Administration Acquisition Regulation; Value Engineering

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Proposed rule.

SUMMARY: This notice invites written comments on a proposed change to the General Services Administration Acquisition Regulation (GSAR) which would delete the current material in part 548 and add material to provide: agency policy for the use of value engineering techniques, value engineering proposal submission and processing requirements

for certain types of contracts, agency policy with respect to shared saving on certain types of contracts, and to prescribe a clause entitled "Value Engineering Program—Architect-Engineer." Part 552 would also be amended to add the text of the clause. The intended effect is to implement the requirements in OMB Circular A-131, Value Engineering, dated February 3, 1988, and to provide guidance to GSA contracting activities pending a permanent revision to the regulation.

DATE: Comments should be submittee to the Office of GSA Acquisition Policy and Regulations at the address shown below on or before September 29, 1988 to be considered in the final rule.

ADDRESS: Interested parties should submit written comments to: General Servcies Administration, Office of GSA Acquisition Policy and Regulations (VP), 18th and F Street, NW, Room 4026, Washington, DC 20405. Requests for a copy of the proposal should be addressed to Ms. Marjorie Ashby at the same address or call (202) 523-2322.

FOR FURTHER INFORMATION CONTACT: Mr. John Joyner, Office of GSA Acquisition Policy and Regulations, 18th and F Street, NW, Washington, DC 20405, (202) 523-4916.

SUPPLEMENTARY INFORMATION: The Director, Office of Managment and Budget (OMB), by memorandum dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. The exemption applies to this rule. The GSA certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibilty Act (5 U.S.C. 601 et seq.). The proposed rule supplements the Federal Acquisition Regulation by providing for the use, where appropriate, of value engineering techniques to identify and eliminate nenessential cost in contracts awarded by the General Services Administration. Therefore, no regulatory flexibility analysis has been prepared. The rule does not contain information collection requirements which require the approval of OMB under (44 U.S.C. 3501 et seq.).

List of Subjects in 48 CFR Parts 548 and 552.

Government procurement.

Dated: August 16, 1988.

Ida M. Ustad,

Director, Office of GSA Acquisition Policy and Regulations.

[FR Doc. 88-19596 Filed 8-29-88; 8:45 am]

BILLING CODE 6820-61-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 23

Export of Bobcat Taken in 1988 and Subsequent Seasons

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Convention on International Trade in Endangered Species of Wild Fauna and Flora (Convention) regulates international trade in certain animal and plant species. As a general rule, exports of animals and plants listed in Appendix II of the Convention may occur only if a Scientific Authority has advised a permit-issuing Management Authority that such exports will not be detrimental to the survival of the species, and if the Management Authority is satisfied that the animals or plants were not obtained in violation of laws for their protection.

This notice announced proposed findings by the Scientific Authority and Management Authority of the United States on the export of bobcat harvested in the 1988 and subsequent years on the Wind River Indian Reservation, Wyoming, by enrolled members of the Arapahoe and Shoshone Tribes. These proposed findings also stipulate that monitoring procedures previously established for other States and Indian tribes be extended to include Wind River Indian Reservation, Wyoming. The Service intends to make these findings to span a period not limited to a single harvest season. The Service requests comments on these proposed findings.

DATE: The Service will consider comments received by September 14, 1988 in making its final determination and rule.

ADDRESS: Please send correspondence concerning this notice to the Office of Scientific Authority, U.S. Fish and Wildlife Service, Washington, D.C. 20240. Materials received will be available for public inspections from 8:00 a.m. to 4:00 p.m., Monday through Friday, at the Office of Scientific Authority, room 537, 1717 H Street NW. Washington, DC or at the Office of Management Authority, room 400, 1375 K Street, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Scientific Authority Finding—Dr. Charles W. Dane, Office of Scientific Authority, U.S. Fish and Wildlife Service, Washington, DC 20240, telephone (202-653-5948).

Management Authority Findings—Mr. Marshall P. Jones. Office of Management Authority, U.S. Fish and Wildlife Service, Washington, DC 20240, telephone (202) 343-4968.

Export Permits—Mr. Richard K. Robinson, Office of Management Authority, U.S. Fish and Wildlife Services, Washington, DC 20240, telephone (202) 343-4955.

State Export Programs—Mr. S. Ronald Singer, Office of Management Authority, U.S. Fish and Wildlife Services, Washington, DC 20240, telephone (202) 343-4963.

SUPPLEMENTARY INFORMATION: On January 5, 1984 (49 FR 590), the Service published a rule granting export approval for bobcats (*Lynx rufus*) and certain other Convention-listed species from specified States for the 1983-84 and subsequent harvest seasons. On March 24, 1988 (53 FR 9631), Kentucky and the White Mountain Apache Tribe were added to this list of approved export States. The purpose of this proposed rule is to add the Wind River Indian Reservation, Wyoming, to the list of State and Indian Nations for which the export of bobcats is approved.

The Convention regulates import, export, reexport, and introduction from the sea of certain animal and plant species. Species for which trade is controlled are included in three appendices. Appendix I includes species threatened with extinction that are or may be affected by trade. Appendix II includes species that although not necessarily now threatened with extinction may become so unless trade in them is strictly controlled. It also lists species that must be subject to regulation in order that trade in other currently or potentially threatened species may be brought under effective control (e.g., because of difficulty in distinguishing specimens of currently or potentially threatened species from those of other listed species). Appendix III includes native species that any Party nation identified as being subject to regulation within its jurisdiction for purposes of preventing or restricting exploitation, and for which it needs the cooperation of other Parties in controlling trade.

In the January 5, 1984, and the August 18, 1983 (48 FR 37494) **Federal Register** documents, the Service announced the decision from a review of listed species concluded at the Fourth Meeting of the Conference of the Parties in Botswana that each of the species or geographically separate populations including the bobcat, should be regarded as listed in Appendix II because of its similarity in appearance to other listed species or populations. As indicated in those documents, the Conference of the

Parties adopted a resolution accepting the report of the Central Committee on the 10-year review of species listed in Appendices I and II. The report included recommendations that these populations ro species should be considered as listed in Appendix II only because of similarity in appearance, if they were to be retained in that appendix.

The January 5, 1984, document described how the Service, as Scientific Authority, planned to monitor the status of these species and their trade on an annual basis so that it could detect any significant downward trends in populations and, where necessary, institute more restrictive export controls in response to them. The document also described how the Services, as Management Authority, would determine if specimens had been lawfully acquired on the basis of tagging requirements.

Scientific Authority Findings

Article IV of the Convention requires that an export permit for any specimen of a species included in Appendix II shall only be granted when certain findings have been made by the Scientific Authority and Management Authority of the exporting country. The Scientific Authority must advise "that such export will not be detrimental to the survival of that species" before a permit can be granted by the Management Authority.

The Scientific Authority for the United States must develop such advice on non-detriment for the export of Appendix II animals in accordance with § 1537(c)(2) of the Endangered Species Act of 1973 (the Act), as amended. The Act states that the Secretary of the Interior is required to base export determinations and advice "upon the best available biological information derived from professionally accepted wildlife management practices but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice."

The bobcat is managed by the wildlife agencies of individual States and Indian Tribes and Nations. Those States and Indian Nations from which the Services has approved the export of bobcats in the 1983–84 and subsequent taking seasons were identified in the January 5, 1984, **Federal Register** (49 FR 590), and the March 24, 1988, **Federal Register** (53 FR 9631), and listed in 50 CFR 23.52. Each export-approved State or Indian Tribe or Nation in which this animal is harvested has a program to regulate the harvest. Based on information received from the Wind River Indian Reservation, Wyoming, the Service proposes adding that Indian Reservation to those States and Indian Reservation and Nations from which bobcat export is approved by the Service.

Consistent with the determination that the bobcat is listed to enable trade in other species to be effectively controlled, the Scientific Authority considers this control aspect when advising on non-detriment. Marking of pelts with tags bearing the country and State of origin, year of harvest, name of the species, a unique serial number, and the issuance of export permits naming the species being traded is sufficient to address problems of identification due to similarity in appearance between bobcats and other species (see Management Authority findings for tag specification).

In addition to considering the effect of trade on species or populations other than those being exported from the United States, the Service will monitor the status of the bobcat managed by the Wind River Indian Reservation, Wyoming, to (1) determine whether treatment of these furbearers, listed because of similarity in appearance, remains appropriate, and (2) detect any significant downward trends in the population and, where necessary, advise on more restrictive export controls in response to them. This monitoring and assessment will follow the same procedures adopted for other States and Indian Tribes and Nations (see 49 FR 590). As part of this monitoring program, the States and Indian Tribes and Nations that have been approved for export of bobcats are annually requested to certify that the harvest of bobcats will not be detrimental to the survival of the species and to provide data and/or the basis for support of this assessment. A determination can be made about the treatment of this species and whether a management program needs to be adjusted in a particular State, Indian Tribe or Nation by a review of available information and accumulated data by the Office of Scientific Authority.

Scientific Authority guidelines developed for bobcat export under the provisions of Convention Article II.2(a), which represent professionally-accepted wildlife management practices, are presented in more detail in the August 18, 1983, **Federal Register** document (48 FR 37494). These guidelines are summarized as follows:

A. Minimum requirements for biological information:

(1) Information on the condition of the population, including trends (the method of determination to be a matter of State, Indian Tribe or Nation's choice), and population estimates where such information is available;

(2) Information on total harvest of the species;

(3) Information on distribution of harvest; and

(4) Habitat evaluation.

B. Minimum requirements for a management program:

(1) There should be a controlled harvest, methods and seasons to be a matter of State, Indian Tribe, or Nation's choice;

(2) All skins should be registered and marked; and

(3) Harvest level objectives should be determined annually by the State, Indian Tribe or Nation.

The Wind River Indian Reservation, Wyoming, has provided population estimates based on the relationship between population density from other studies in the State and habitat types and distribution on the Reservation. This information has been supplemented with data on reproductive rates and age structure of the population obtained from harvested bobcats, and with relative number of bobcats trapped per trapping effort.

Bobcat harvest on the Wind River Indian Reservation is limited to enrolled members of the Shoshone and Arapahoe Tribes who must attach a tribal tab to the bobcat pelt immediately at take. Under an interagency agreement between the Bureau of Indian Affairs and the U.S. Fish and Wildlife Service, the Service oversees the wildlife program on the Wind River Indian Reservation. Wind River Agency game wardens monitor and control actual hunting and trapping activities and will replace tribal tags with Convention export tags before the bobcat pelt ownership is transferred or the pelt leaves the Reservation.

Based upon information presented by the Wind River Reservation, Wyoming, including Reservation Agency bobcat regulations, and in consideration of the basis for the species' listing in Appendix II of the Convention, the Service proposes to issue Scientific Authority advice in favor of export of bobcats harvested in 1988 and subsequent harvest seasons from Wind River Reservation, Wyoming.

Management Authority Findings

Exports of Appendix II species are be allowed under the Convention only if the Management Authority is satisfied that the specimens were not obtained in contravention of laws for the protection of the involved species. The Service, therefore, must be satisfied that the bobcat pelts, hides, or products being exported were not obtained in violation of State, Indian Tribal or Nation, or Federal law in order to allow export. Evidence of legal taking for Alaskan gray wolf, Alaskan brown or grizzly bear, American alligator, bobcat, lynx, and river otter is provided by State and Indian Tribe or Nation tagging programs. The Service annually contracts for the manufacture and delivery of special Convention animal-hide tags for export-qualified States and Indian Nations. The Service has adopted the following Management Authority export guidelines for the 1983–84 and subsequent taking seasons:

(1) Current State and Tribe or Nation hunting, trapping and tagging regulations and sample tags must be on file with the Office of Management Authority;

(2) The tags must be durable and permanently locking, and must show U.S.-CITES logo, State and Indian Tribe or Nation of origin, year of take, species, and be serially unique;

(3) The tag must be applied to all pelts taken within a minimum time after take, as specified by the State and Indian Tribe or Nation, and such time should be as short as possible to minimize movement of untagged pelts;

(4) The tag must be permanently attached as authorized and prescribed by the State and Indian Tribe or Nation;

(5) State and Indian Tribe or Nation registered-dealers or State and Indian Tribe, or Nation-licensed takers allowed to attach export tags must account for tags received and must return unused tags to the State or Indian Tribe or Nation within a specified time after taking season closes; and,

(6) Fully manufactured fur (or hide) products may be exported from the United States only when the Convention export tags, removed from the hides used to manufacture the product being exported, are surrendered to the Service prior to export.

Proposed Export Decision

The Service proposes to approve exports of Wind River Indian Reservation bobcats harvested in the 1988 and subsequent harvest seasons on the grounds that both Scientific Authority and Management Authority guidelines are satisfied.

Comments Solicited

The Service requests comments on these proposed findings. Final findings will take into consideration the comments and any additional information received, and such consideration might lead to final findings that differ from this proposal.

The proposal is issued under authority of the Endangered Species Act of 1973 as amended (16 U.S.C. 1531 et seq.). The authors are S Ronald Singer, Office of Management Authority, and Dr. Charles W. Dane, Office of Scientific Authority.

Note: The Department has previously determined that the export of bobcats of various States and Indian Tribes or Nations, taken in the 1983–1984 and subsequent harvest seasons, was not a major Federal action that would significantly affect the quality of the human environment within the meaning of Section 102(1)(c) of the National Environmental Policy Act and, therefore, the preparation of an Environmental Impact Statement was not required (48 FR 37494). Because these proposed findings do not significantly differ from the previous export findings, the previous determination not to prepare an Environmental Impact Statement on export of bobcats taken during the 1983–1984 and subsequent harvest seasons in certain States (49 FR 590) remains appropriate. The Department has also previously determined that such harvest was not a major rule under Executive Order 12291 and did not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601). Because the existing rule treats exports on a State-by-State and Indian Nation-by-Indian Nation basis and proposes to approve export in accordance with a State or Indian Nation management program, the rule will have little effect on small entities in and of itself. This proposed rule does not contain any information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq.

List of Subjects in 50 CFR Part 23

Endangered and threatened wildlife, Exports, Fish, Imports, Plants (agriculture), Treaties.

PART 23—ENDANGERED SPECIES CONVENTION

Accordingly, the Service proposes to amend part 23 of Title 50, Code of Federal Regulations, as set forth below:

1. The authority citation for Part 23 continues to read as follows:

Authority: Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249; and Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531 et seq.

2. In Subpart F—Export of Certain Species, § 23.52 is revised to read as follows:

§ 23.52 Bobcat (Lynx rufus).

States for which the export of the indicated season's harvest may be permitted under § 23.15 of this part:

	1977–78	1978–79	1979–80	1980–81	1981–82	1982–83	1983 & subsequent	1987 & subsequent	1988 & subsequent
Alabama	+	+	+	+	+	+	+	+	+
Arizona	+	+	+	+	+	+	+	+	+
Arkansas	+	+	+	+	+	+	+	+	+
California	+	+	+	+	+	+	+	+	+
Colorado	+	+	+	+	+	+	+	+	+
Florida	+	+	E	+	+	+	+	+	+
Georgia	+	+	+	+	+	+	+	+	+
Idaho	+	+	+	+	+	+	+	+	+
Kansas	+	+	+	+	+	+	+	+	+
Kentucky	—	—	—	—	—	—	—	+	+
Klamath Tribe	—	—	—	—	+	+	+	+	+
Louisiana	+	+	+	+	+	+	+	+	+
Maine	+	+	+	+	+	+	+	+	+
Massachusetts	+	+	E	+	+	+	+	+	+
Michigan	+	+	+	+	+	+	+	+	+
Minnesota	+	+	+	+	+	+	+	+	+
Mississippi	+	+	+	+	+	+	+	+	+
Missouri	—	—	—	+	+	+	+	+	+
Montana	+	+	+	+	+	+	+	+	+
Navajo Nation	+	+	+	+	+	+	+	+	+
Nebraska	+	+	+	+	+	+	+	+	+
Nevada	+	+	+	+	+	+	+	+	+
New Hampshire	—	—	—	+	+	+	+	+	+
New York	+	+	+	+	+	+	+	+	+

	1977–78	1978–79	1979–80	1980–81	1981–82	1982–83	1983 & subsequent	1987 & subsequent	1988 & subsequent
North Carolina	+	+	+	+	+	+	+	+	+
North Dakota	+	+	E	+	+	+	+	+	+
Oklahoma	—	—	+	+	+	+	+	+	+
Oregon	+	+	E(1)	+	+	+	+	+	+
Penobscot Nation	—	—	—	—	—	—	+	+	+
South Carolina	+	+	+	+	+	+	+	+	+
South Dakota	+	+	+	+	+	+	+	+	+
Tennessee	+	+	+	+	+	+	+	+	+
Texas	+	+	E(2)	+	+	+	+	+	+
Utah	—	—	+	+	+	+	+	+	+
Vermont	+	+	+	+	+	+	+	+	+
Virginia	+	+	+	+	+	+	+	+	+
Washington	+	+	+	+	+	+	+	+	+
West Virginia	+	+	+	+	+	+	+	+	+
Wisconsin	+	E	+	+	+	+	+	+	+
White Mt Tribe	—	—	—	—	—	—	—	+	+
Wind River Res	—	—	—	—	—	—	—	—	P
Wisconsin	+	+	E	+	+	+	+	+	+
Wyoming	+	+	+	+	+	+	+	+	+

Legend: +—Export approval; ——export not approved; E—1979–80 bobcat enjoined by U.S. District Court, District of Columbia; E(1)—As above but for eastern portion of State; E(2)—As above but for high plains ecological area; P—Proposed.

(b) Condition on export: Each pelt must be clearly identified as to species, State or Indian Tribe or Nation of origin, and season of taking by a permanently attached, serially numbered tag of a type approved and attached under conditions established by the Service. Exception to tagging requirement: finished furs and fully manufactured fur products may be exported from the United States when the State or Indian Tribe or Nation export tags, removed from the hides used to manufacture the product being exported, are surrendered to the Service prior to export. Such tags must be removed by cutting the tag strap on the female side next to the locking socket of the tag so the locking socket and locking tip remain joined.

Dated: August 5, 1988.

Susan Recce

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 88-19601 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-55-M

Notices

Federal Register
Vol. 53, No. 168
Tuesday, August 30, 1988

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ACTION

Foster Grandparent Program (FGP)

AGENCY: ACTION.

ACTION: Notice of Availability of Funds.

SUMMARY: ACTION announces the availability of funds for Fiscal Year 1989 for new FGP grants. FGP is authorized under Title II, Part B, of the Domestic Volunteer Service Act of 1973, as amended (Pub. L93–113). Grants will be competed only in ACTION Region IV (covering the states of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee) and in ACTION Region VI (covering the states of Arkansas, Kansas, Louisiana, Missouri, New Mexico, Oklahoma, and Texas).

Completed application packages are to be submitted to the appropriate ACTION State Office. FGP project grants will be awarded for a 12-month period and may be renewed.

Application forms and technical assistance are available from ACTION State Offices:

State Offices in Regions IV and V

Region IV

John D. Timmons, ACTION State Program Director, 2121 8th Avenue North, Room 722, Birmingham, AL 35203–2307, Telephone: (205) 254–1908
Henry J. Jibaja, ACTION State Program Director, 930 Woodcock Road, Suite 221, Orlando, FL 32803–3750, Telephone: (407) 648–6117
David A. Dammann, ACTION State Program Director, 75 Piedmont Avenue, N.E., Suite 412, Atlanta, GA 30303–2587, Telephone: (404) 331–4646
Arthur Brown, III, ACTION State Program Director, Federal Building, Room 1005–A, 100 West Capital Street, Jackson, MS 39269, Telephone: (601) 965–4462
Robert L. Winston, ACTION State Program Director, Federal Building, P.O. Century Station, 300 Fayetteville, Street Mall, Rm. 131, Raleigh, NC 27601–1739, Telephone: (919) 856–4731)
Jerome J. Davis, ACTION State Program Director, Federal Building, Room 872, 1835 Assembly Street, Columbia, SC 29201–2430, Telephone: (803) 765–5771
Alfred E. Johnson, ACTION State Program Director, Federal Building/ U.S. Courthouse, 801 Broadway, Room 246, Nashville, TN 37203–3889, Telephone: (615) 251–5561

Region VI

Robert Torvestad, ACTION State Program Director, Federal Building, Room 2506, 700 West Capitol Street, Little Rock, AR 72201–3291, Telephone: (501) 378–5234
James M. Byrnes, ACTION State Program Director, Federal Building, Room 248 444 S.E. Quincy, Topeka, KS 66603–3501, Telephone: (913) 295–2540
Willard L. Labrie, ACTION State Program Director, 626 Main Street, Suite 102, Baton Rouge, LA 70801–1910, Telephone: (504) 389–0471
John McDonald, ACTION State Program Director, Federal Office Building, 911 Walnut, Room 1701, Kansas City, MO 64106–2009, Telephone: (816) 374–5256
Ernesto Ramos, ACTION State Program Director, Federal Building, Cathedral Place, Room 129, Santa Fe, NM 87501–2026, Telephone: (505) 988–6577
H. Zeke Rodriguez, ACTION State Program Director, 200 N.W. 5th, Suite 912, Oklahoma City, OK 73102–6093, Telephone: (405) 231-5201
Jerry G. Thompson, ACTION State Program Director, 611 East Sixth State, Suite 107, Austin, TX 78701–3747, Telephone: (512) 482–5671

A. Background and Purpose

The Foster Grandparent Program (FGP) is authorized under Title II, Part B, of the Domestic Volunteer Service Act of 1973, as amended (Pub. L. 93–113) (the "Act"). The program was established for the purpose of providing opportunities for low-income persons aged 60 or older to provide supportive, person-to-person services in health, education, welfare, and related settings to children having exceptional needs . . . [and] . . . children with special needs." FPG volunteer services are provided in a variety of health, education, and related social settings, in both residential and nonresidential facilities.

FGP grants are awarded to qualified public agencies and private non-profit organizations. Program sponsors in turn recruit and enroll low-income persons aged 60 or older as Foster Grandparents. Volunteers are placed in volunteer stations which ar public agencies, private non-profit organizations, and proprietary health care organizations serving children. Foster Grandparents are assigned on a one-to-one basis to children with special needs as defined under program policy.

B. Programming Emphasis

ACTION will give special consideration to applicants with well developed plans for utilizing Foster Grandparent volunteer services to assist children identified as being at risk of substance abuse, physical/sexual abuse, abandoned/neglected, juvenile delinquency, status offenses, and other destructive behaviors. Children whose need is primarily economic, or whose parent is single and working, do not meet the FGP definition of special needs.

C. Eligible Applicants

Only public agencies or private non-profit organization are eligible to apply for FGP grants. In addition, applicants:

1. Must have the authority to accept, and the capability to administer, the FGP project grant according to ACTION guidelines.
2. Cannot be located in an existing FGP project service area.
3. Must be able to demonstrate that the service area has an adequate number of low-income elderly who can be recruited as Foster Grandparent volunteers, and a sufficient number of special needs children in need of volunteer services.

D. Children/Volunteer Eligibility

1. *Child* is any individual under 21 years of age.
2. *Children with special needs* includes those at risk of substance abuse, those who are abused or neglected, in need of foster care, status offenders, juvenile delinquents, runaway youth, certain teen-age parents, and children in need of protective intervention in their homes. Existence of a child's special need shall be verified by an appropriate professional before a Foster Grandparent is assigned to the child.
3. Persons aged 60 and older whose income do not exceed the levels

specified below are eligible to be Foster Grandparent volunteers.

For family units of	
One	$6,700
Two	9,050
Three	11,400
Four	13,750
Five	16,100
Six	18,450
Seven	20,800
Eight	23,150

E. Scope of Grant

Each grant will support between 40 and 60 volunteer service years. The amount of each grant includes Foster Grandparent direct benefits (stipends, meals, uniforms, insurance, physical examinations, recognitions, and transportation).

Federal cost per Volunteer Service Year (VSY) budgeted shall not exceed $3,300 unless an applicant can provide sufficient justification for a higher cost. The total amount budgeted for volunteer expenses shall be a sum equal to at least 90% of the total Federal funds budgeted.

Applicants are required to provide at least 10% in matching funds from non-Federal sources, either in allowable cash or in-kind dollar equivalents. The FGP project director should serve on a full-time (100% time on project) basis, unless a waiver from ACTION is obtained. Publication of this announcement does not obligate ACTION to award any specific number of grants or any specific amount of funds.

F. General Criteria for Grant Selection

ACTION will use the criteria specified below in the selection of sponsors for these new grants. A number of stated elements must be found in the applicant's proposal. The applicant must:

1. Have experience with either social programs for persons age 60 or older or with children with special needs.
2. Comply with applicable financial and program requirements established by ACTION or other Federal agencies.
3. Develop goals and objectives consistent with the purpose of the program that are specific, time phased, and measurable.
4. Provide for reasonable efforts to recruit and involve males, and hard-to-reach minority, ethnic, and isolated or disabled eligible persons.
5. Produce evidence of non-Federal, public or private support in the form of endorsement letters from public agencies and private non-profit organizations. Information in the letters must contain awareness and willingness to provide funding support to the FGP project sponsor.
6. Include a realistic transportation plan for the project based on the lowest cost, transportation mode(s).
7. Offer a mix of residential, non-residential, or a variety of community settings for Foster Grandparent placements.

G. Additional Factors

ACTION staff will use the following additional tests in choosing among applicants who meet all of the minimum criteria specified above:

1. How important is the proposed project to the low-income, elderly community? Who will benefit from the project?
2. Does the project show evidence of skillful and careful planning to attain project goals?
3. Did the sponsor answer project application questions with specificity?
4. Sponsoring Organization:
   (a) Does the sponsoring organization have adequate experience in dealing with the problem(s)/needs identified in the project application?
   (b) Are plans for volunteer supervision and sponsor-provided training adequate for the volunteer assignments?
   (c) Are the procedures for staff accountability adequate for the FGP project?
5. Foster Grandparents:
   (a) Is the number of volunteers being requested consistent with the goals and objectives specified for the project?
   (b) Are the roles of the volunteers designed to enhance or ameliorate the lives of children with special needs to be served?
   (c) Are the Foster Grandparent assignments designed to use their time in an efficient manner?

H. Application Review Process

ACTION Regions IV and VI will review and evaluate all applications prior to their submission to Headquarters. The final selection will be made by the Associate Director of Domestic Operations. ACTION reserves the right to ask for evidence of any claims of past performance or future capability.

I. Application Submission and Deadline

One signed and two copies of all completed applications from Regions IV or VI must be submitted to the respective ACTION State Office (see end of Notice for names/addresses). The deadline for receipt of applications is 5:00 p.m., local time, October 19, 1988. Applications received after October 19, but postmarked five days before the deadline date, will also be accepted for consideration.

Donna M. Alvarado,
Director.
[FR Doc. 88-19602 Filed 8-29-88; 8:45 am]
BILLING CODE 6050-28-M

DEPARTMENT OF AGRICULTURE

Federal Grain Inspection Service

Advisory Committee Meeting

Pursuant to the provisions of section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), a notice is hereby given of the following committee meeting:

Name: Federal Grain Inspection Service Advisory Committee.

Date: September 26, 1988.

Place: USDA FGIS Technical Center, 10383 North Executive Hills Blvd., Kansas City, Missouri 64153.

Time: 10:00 a.m.

Purpose: A subcommittee to review and prepare recommendations to the Federal Grain Inspection Service Advisory Committee on the Federal Grain Inspection Service mission statement.

The agenda includes a review of past mission statements; declaration of policy as stated in the United States Grain Standards Act and as modified by the Grain Quality Improvement Act of 1986; and proposed amended mission statements.

The meeting will be open to the public. Public participation will be limited to written statements unless otherwise requested by the Subcommittee Chairman. Persons, other then members, who wish to address the Subcommittee at the meeting or submit written statements before, at, or after the meeting should contact Fred Midcap, Subcommittee Chairman, 5143 Rd. 3, Wiggins, Colorado 80654, telephone (303) 432-5528.

Dated: August 25, 1988.

W. Kirk Miller,
Administrator.
[FR Doc. 88-19640 Filed 8-29-88; 8:45 am]
BILLING CODE 3410-EN-M

Advisory Committee Meeting

Pursuant to the provisions of section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), a notice is hereby given of the following committee meeting:

Name: Federal Grain Inspection Service Advisory Committee.

Date: September 27, 1988.

Place: American Farm Bureau Federation Board Room, 225 Touhy Avenue, Park Ridge, Illinois 60068.

Time: 10:00 a.m.

Purpose: A subcommittee to review and prepare recommendations to the Federal Grain Inspection Service Advisory Committee on whether it is possible to determine incontrovertibly if export grain is likely to deteriorate in condition or quality while in-transit to a foreign destination and whether regulatory action is warranted.

The agenda includes a review of information presented at the August 12, 1988, Federal Grain Inspection Service Advisory Committee meeting and other available information.

The meeting will be open to the public. Public participation will be limited to written statements unless otherwise requested by the Subcommittee Chairman. Persons, other than members, who wish to address the Subcommittee at the meeting or submit written statements before, at, or after the meeting should contact John White, Jr., Subcommittee Chairman, 1701 Townda Avenue, Bloomington, Illinois 61701, telephone (309) 557-3211.

Dated: August 25, 1988.

W. Kirk Miller,

Administrator.

[FR Doc. 88-19641 Filed 8-29-88; 8:45 am]

BILLING CODE 3410-EN-M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Regional Forum; California

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that the United States Commission on Civil Rights will convene a regional forum at 8:00 a.m. on September 8, 1988, and adjourn at 3:00 p.m. on September 9, 1988, in the Gold Room of the Biltmore Hotel, 506 South Grand Avenue, Los Angeles, California 90071. The purpose of the meeting is to conduct a forum on changing perspectives on civil rights.

Persons desiring additional information, or planning a presentation to the Commission, should contact Susan J. Prado, Acting Staff Director, (202) 523-5571. Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Staff Director's office at least five days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, August 19, 1988.

Susan J. Prado,

Acting Staff Director.

[FR Doc. 88-19591 Filed 8-29-88; 8:45 am]

BILLING CODE 6335-01-M

Massachusetts Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Massachusetts Advisory Committee to the Commission will convene at 2:00 p.m. and adjourn at 4:30 p.m., September 22, 1988, in Room 505, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203. The purpose of the meeting is to discuss and act upon the draft of a briefing memorandum, entitled Stemming Violence and Intimidation Through the Massachusetts Civil Rights Act, and to review and act upon a draft of ideas for the Committee's next project.

Persons desiring additional information, or planning a presentation to the Commission, should contact Committee Chairperson Philip Perlmutter (617/330-9600) in Boston, Massachusetts or John I. Binkley, Director of the Eastern Regional Division (202/523-5264; TDD 202/376-8117) in Washington, DC. Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Eastern Regional Division at least five (5) working days before the scheduled date of the meeting. The meeting will be conducted pursuant to the provisions of the Rules and Regulations of the Commission.

Dated at Washington, DC, August 19, 1988.

Susan J. Prado,

Acting Staff Director.

[FR Doc. 88-19589 Filed 8-29-88; 8:45 am]

BILLING CODE 6335-01-M

Utah Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that the Utah Advisory Committee to the Commission will convene at 7:00 p.m. and adjourn at 9:00 p.m., on September 20, 1988, at the Utah State Office of Education, Board Room, 250 East 5th South, Salt Lake City, Utah 84111. The purpose of the meeting is to plan activities and programming for the coming year.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson, Robert E. Riggs or Philip Montez, Director of the Western Regional Division, (213) 894-3437 (TDD 213/894-0508). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, August 19, 1988.

Susan J. Prado,

Acting Staff Director.

[FR Doc. 88-19590 Filed 8-29-88; 8:45 am]

BILLING CODE 6335-01-M

South Dakota Advisory Committee; Agenda and Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a subcommittee of the South Dakota Advistory Committee to the Commission will convene at 2:00 p.m. and adjourn at 6:00 p.m. on September 16, 1988, at the American Indian Council, 331 North Phillips Avenue, Sioux Falls, South Dakota 57102. The purpose of the meeting is to evaluate material and a draft report concerning women's issues.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson, Francis Whitebird or Philip Montez, Director of the Regional Division (213) 894-3437, (TDD 213/894/0508). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated in Washington, DC, August 23, 1988.

Susan J. Prado,

Acting Staff Director.

[FR Doc. 88-19597 Filed 8-29-88; 8:45 am]

BILLING CODE 6335-01-M

DEPARTMENT OF COMMERCE

International Trade Administration

[A-475-703]

Antidumping Duty Order; Granular Polytetrafluoroethylene Resin from Italy

AGENCY: International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: In separate investigations concerning granular polytetrafluoroethylene (PTFE) resin from Italy, the United States Department of Commerce (the Department) and the United States International Trade Commission (the ITC) have determined that granular PTFE resin from Italy is being sold at less than fair value and that sales of granular PTFE resin from Italy are materially injuring a U.S. industry. Therefore, based on these findings, all unliquidated entries, or warehouse withdrawals, for consumption, of granular PTFE resin from Italy made on or after April 20, 1988, the date on which the Department published its "Preliminary Determination" notice in the **Federal Register**, will be liable for the possible assessment of antidumping duties. Further, a cash deposit of estimated antidumping duties must be made on all such entries, and withdrawals from warehouse, for consumption made on or after the date of publication of this antidumping duty order in the **Federal Register**.

EFFECTIVE DATE: August 30, 1988.

FOR FURTHER INFORMATION CONTACT: Brian H. Nilsson or Louis Apple, Office of Antidumping Investigations, International Trade Administration, United States Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 377-5332 or 377-1769.

SUPPLEMENTARY INFORMATION: The product covered by this order is granular polytetrafluoroethylene resin, filled and unfilled, which is provided for in the *Tariff Schedules of the United States* (TSUS) items 445.54. The corresponding Harmonized System (HS) number is 3904.61.00. Polytetrafluoroethylene dispersions in water and fine powders are not covered by this investigation.

In accordance with section 735(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1673d(a)) (the Act), on July 5, 1988, the Department made its final determination that granular PTFE resin from Italy is being sold at less than fair value (53 FR 26096, July 11, 1988). On August 16, 1988, in accordance with section 735(d) of the Act, the ITC notified the Department that such imports materially injure a U.S. industry.

Therefore, in accordance with section 736 and 751 of the Act (19 U.S.C. 1673e and 1675), the Department directs United States Customs officers to assess, upon further advice by the administering authority pursuant to section 736(a)(1) of the Act (19 U.S.C. 1673e(a)(1)), antidumping duties equal to the amount by which the foreign market value of the merchandise exceeds the United States price for all entries of granular PTFE resin from Italy. These antidumping duties will be assessed on all unliquidated entries of granular PTFE resin entered, or withdrawn from warehouse, for consumption on or after April 20, 1988, the date on which the Department published its "Preliminary Determination" notice in the **Federal Register** (53 FR 12967).

On and after the date of publication of this notice, United States Customs officers must require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margins noted below:

Manufacturers/producers/exporters	Weighted-average margin (%)
Montefluos S.p.A./Ausimont U.S.A.	46.46
All others	46.46

This determination constitutes an antidumping duty order with respect to granular PTFE resin from Italy, pursuant to section 736 of the Act (19 U.S.C. 1673e) and section 353.48 of the Commerce Regulations (19 CFR 353.48). We have deleted from the Commerce Regulations Annex I of 19 CFR Part 353, which listed antidumping duty findings and orders currently in effect. Instead, interested parties may contact the Central Records Unit, Room B-099, Import Administration, for copies of the updated list of orders currently in effect.

This notice is published in accordance with section 736 of the Act (19 U.S.C. 1673e) and § 353.48 of the Commerce Regulations (19 CFR 353.48).

Timothy Bergan,

Acting Assistant Secretary for Import Administration.

August 24, 1988.

[FR Doc. 88-19690 Filed 8-29-88; 8:45 am]

BILLING CODE 3510-DS-M

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews.

SUMMARY: The Department of Commerce has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings. In accordance with the Commerce Regulations, we are initiating those administrative reviews.

EFFECTIVE DATE: August 30, 1988.

FOR FURTHER INFORMATION CONTACT: Bernard T. Carreau or Richard W. Moreland, Office of Countervailing Compliance or Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-4733/2786.

SUPPLEMENTARY INFORMATION:

Background

On August 13, 1985, the Department of Commerce ("the Department") published in the **Federal Register** (50 FR 32556) a notice outlining the procedures for requesting administrative reviews. The Department has received timely requests, in accordance with § 353.53a (a)(1), (a)(2), (a)(3), and 355.10(a)(1) of the Commerce Regulations, for administrative reviews of various antidumping and countervailing duty orders and findings.

Initiation of Reviews

In accordance with § 353.53a(c) and 355.10(c) of the Commerce Regulations, we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews no later than August 31, 1989.

	Periods to be reviewed
Antidumping duty proceedings and firms:	
Canada: Certain dried heavy salted codfish (A-122-402)	07/01/87-06/30/88

	Periods to be reviewed
Bon Portage	
Canada Packers	
Island Saltfish	
Sable Fish Packers	
Le Groupe Purdel	
Bay Harbor	
John's Cove Fisheries	
Canadian Saltfish	
Canus Fisheries	
East Germany: Solid urea (A-429-601)	01/02/87-06/30/88
Chemie	
Japan: Fabric expanded neoprene laminate (A-588-404)	07/01/87-06/30/88
Heiwa rubber	
USSR: Solid urea (A-461-601)	01/02/87-06/30/88
Soyuzpromexport	
Countervailing duty proceedings and firms:	
Uruguay: Leather wearing apparel (C-355-001)	01/01/87-12/31/87

Interested parties are encouraged to submit applications for administrative protective orders as early as possible in the review process.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930 (19 U.S.C. 1675(a)) and 19 CFR 353.53a(c) and 355.10(c).

Date: August 17, 1988.

Joseph A. Spetrini,

Acting Deputy, Assistant Secretary for Compliance.

[FR Doc. 88-19691 Filed 8-29-88; 8:45 am]

BILLING CODE 3510-DS-M

[A-588-015]

Preliminary Results of Antidumping Duty Administrative Review and Intent To Revoke in Part

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke in Part.

SUMMARY: In response to requests by the petitioners and the respondents, the Department of Commerce has conducted an administrative review of the antidumping finding on television receivers, monochrome and color, from Japan. The review covers seven manufacturers/exporters of this merchandise to the United States and varius periods from April 1, 1980 through February 28, 1987. The review indicates the existence of dumping margins for certain firms during certain periods.

As a result of the review, the Department has preliminarily determined to assess antidumping duties equal to the differences between United States price and foreign market value, and intends to revoke the antidumping finding with respect to Hitachi and Sanyo.

Where we received no company-supplied information or where information was inadequate or untimely, we used the best information available for assessment and cash deposit purposes.

Interested parties are invited to comment on these preliminary results and intent to revoke in part.

EFFECTIVE DATE: August 30, 1988.

FOR FURTHER INFORMATION CONTACT: J.E. Downey, Wendy J. Frankel, or John R. Kugelman, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-3601.

SUPPLEMENTARY INFORMATION: .

Background

On August 18, 1983, and September 27, 1983, the Department of Commerce ("the Department") published in the **Federal Register** (48 FR 37508 and 48 FR 44101) tentative determinations to revoke in part the antidumping finding on television receivers, monochrome and color, from Japan (36 FR 4597, March 10, 1971). On February 11, 1988, the Department published in the **Federal Register** (53 FR 4050) the final results of its last administrative review of the finding.

The petitioners and respondents requested in accordance with § 353.53a(a) of the Commerce Regulations that we conduct the administrative reviews. We published notices of initiation of the antidumping duty administrative reviews on November 27, 1985 (50 FR 44825), April 18, 1986 (51 FR 13273), July 9, 1986 (51 FR 24883), and May 20, 1987 (52 FR 18937). As required by section 751 of the Tariff Act of 1930 ("the Tariff Act"), the Department has new conducted those administrative reviews.

Scope of the Review

Imports covered by the review are shipments of television receiving sets, monochrome and color, from Japan. Television receiving sets include, but are not limited to, units known as projection televisions, receiver monitors, and kits (containing all parts necessary to receive a broadcast television signal and produce a video image). Not included are certain monitors not capable of receiving a broadcast signal, certain combination units (combination television receivers with other electrical entertainment components such as tape recorders, radio receivers, etc.), and certain subassemblies not containing the components essential for receiving a broadcast television signal and producing a video image.

This review covers seven manufacturers/exporters of Japanese television receivers, monochrome and color, and various periods from April 1, 1980 through February 28, 1987.

Funai Electric failed to respond to our sales questionnaire for the eight review period, covering March 1, 1986-February 28, 1987. NEC failed to respond to our cost-of-production questionnaire for the eighth review period. Sharp Corporation failed to respond to our supplemental sales questionnaire for the second review period, covering April 1, 1980-March 31, 1981.

Therefore, for these three firms we used the best information available for assessment and estimated antidumping duty cash deposit purposes. As best information available we used information that was adverse to the firms. For Funai, we used its last rate as best information available. For NEC we use that firms' own data as best information available, since this rate is in excees of both its past rates and the highest rate from the prior review of any other firm. For Sharp we used the highest rate from the prior review of other firms as best information available.

United States Price

In calculating United States price the Department used purchase price or exporter's sales priece ("ESP") both as defined in section 772 of the Tariff Act, as appropriate. Purchase price and ESP were based on the packed f.o.b., c.i.f., or delivered price to unrelated purchasers in the United States. We made adjustments where applicable, for ocean freight, marine insurance, U.S. and Japanese land freight, inland freight insurance, U.S. and Japanese brokerage fees, Japanese customs clearance fees, wharfage, export license fees, forwarding and handling charges, export selling expenses incurred in Japan, discounts, royalties, rebates, commissions to unrelated parties, and the U.S. subsidiaries' selling expenses. No other adjustments were claimed or allowed. We accounted for taxes imposed in Japan, but rebated or not collected by reason of the exportation of the merchandise to the United States, by multiplying the ex-factory price of the televisions sold in the United States by the tax rate and adding the result to the U.S. price.

Foreign Market Value

In calculatiang foreign market value the Department used home market price, as defined in section 773 of the Tariff Act, because sufficient quantities of such or similar merchandise were sold in the home market to provide a basis for comparison. Home market price was based on the packed, ex-factory or delivered price to unrelated purchasers in the home market. Where applicable, we made adjustments for inland freight, insurance, rebates, credit expenses, discounts, warranties, advertising, sales promotion, royalties, differences in the physical characteristics of the merchandise, and packing. For the sixth review period, we disallowed that portion of Mitsubishi's claimed advertising expense that was not related to telephone sales.

We made further adjustments, where applicable, for indirect selling expenses to offset U.S. commissions to unrelated parties and U.S. selling expenses for ESP calculations. We allowed as indirect selling expenses those selling expenses incurred by the related distributors. Finally, we made circumstances-of-sale adjustments for commodity tax differences, where appropriate. Level-of-trade adjustments were claimed but disallowed. No other adjustments were claimed or allowed.

Preliminary Results of Review and Intent to Revoke in Part

As a result of our review, we preliminarily determine for appraisement purposes that the margins range from 0 to 16.77 percent, 0 to 78.82 percent, and 0 to 301.20 percent for Fujitsu General, Mitsubishi, and NEC, respectively. Also, we preliminarily determine that cash deposit rates are as follows:

Manufacturer/Exporter	Period of review	Margin (Percent)
Fujitsu General	04/01/83 to 03/31/84	[1] 0.15
	04/01/84 to 02/28/85	.11
Funai Electric	03/01/86 to 02/28/87	21.93
Hitachi	04/01/83 to 09/27/83	[1] .16
	03/01/86 to 02/28/87	[1] .16
Mitsubishi	04/01/83 to 03/31/84	.13
	04/01/84 to 02/28/85	.07
NEC	04/01/83 to 03/31/84	18.18
	04/01/84 to 02/28/85	6.69
	03/01/85 to 02/28/86	7.24
	03/01/86 to 02/28/87	31.14
Sanyo	04/01/83 to 03/31/84	[1] 2.86
	04/01/84 to 02/28/85	[1] 2.86
	03/01/86 to 02/28/87	[1] 2.86
Sharp	04/01/80 to 03/31/81	3.37

[1] No shipments during the period; rate from last review in which there shipments.

Parties to the proceeding may request disclosure and/or an administrative protective order within 5 days of the date of publication of this noticed and may request a hearing within 8 days of publication. Any hearing, if requested, will be held 35 days after the date of publication or the first workday thereafter. Pre-hearing briefs and/or written comments from interested parties may be submitted not later than 25 days after the date of publication. Rebuttal briefs and rebuttal comments, limited to issue raised in those comments, may be filed not later than 32 days after the date of publication. The Department will publish the final results of the administrative review including the results of its analysis of any such comments or hearing.

Hitachi had no commercial shipments for six years and Sanyo had no shipments for four years. Therefore, we intend to revoke the antidumping finding with respect to this merchandise manufactured by Hitachi or Sanyo.

As provided for in § 353.54(e) of the Commerce Regulations, Hitachi and Sanyo have agreed in writing to an immediate suspension of liquidation and reinstatement in the finding under circumstances specified in the written agreement. If this partial revocation is made final, it will apply to all uniliquidated entries of this merchandise manufactured and exported to the U.S. by Hitachi or Sanyo, entered, or withdrawn from warehouse, for consumption on or after August 18, 1983 and September 27, 1983, respectively.

On January 26, 1988, we received allegations from Zenith, a petitioner, that Japanese TV manufacturers might be involved in transshipments through third countries, or final assembly operations in third countries or in the U.S. which use Japanese components, in an attempt to circumvent this antidumping finding. We investigated these allegations as they might relate to Hitachi or Sanyo, and we have no evidence that either firm is attempting to circumvent this finding.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisement instructions on each exporter directly to the Customs Service.

Further as provided for by § 353.48(b) of the Commerce Regulations, a cash deposit of estimated antidumping duties based on the most recent of the above margins shall be required for the above firms, except Fujitsu General and Mitsubishi. The rates for Fujitsu General and Mitsubishi remain unchanged from their rates in the last results of review, published on February 11, 1988 (53 FR 4050). For any shipments of this merchandise manufactured by Toshiba, Matsushita, or Victor, the cash deposit will continue to be at the rates published in the final results of the last administrative review for these firms (52 FR 8940, March 20, 1987 and 50 FR 24278, June 10, 1985, respectively).

For any future entries of this merchandise from a new exporter, not covered in this or prior reviews, whose first shipments occurred after February 28, 1987 and who is unrelated to any reviewed firm or any previously reviewed firms, a cash deposit of 31.14 percent shall be required. These deposit requirements are effective for all shipments of Japanese television receivers, monochrome and color, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review, intent to revoke in part, and notice are in accordance with section 751(a)(1) and (c) of the Tariff Act (19 U.S.C. 1675 (a)(1), (c)) and 19 CFR 353.53a and 353.54.

Date: August 24, 1988.

Timothy N. Bergan,

Acting Assistant Secretary for Import Administration.

[FR Doc. 88-19689 Filed 8-29-88; 8:45 am]

BILLING CODE 3510-DS-M

Short-Supply Review on Certain Railroad Axles; Request for Comments

AGENCY: Import Administration/International Trade Administration, Commerce.

ACTION: Notice and request for comments.

SUMMARY: The Department of Commerce hereby announces its review of a request for a short-supply determination under Article 8 of the U.S.-Brazil Arrangement Concerning Trade in Certain Steel Products with respect to certain railroad axles.

DATE: Comments must be submitted no later than September 9, 1988.

ADDRESS: Send all comments to Nicholas C. Tolerico, Director, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Department of

Commerce, Room 7866, 14th Street and Constitution Avenue NW., Washington, DC 20230, (202) 377-0159.

SUPPLEMENTARY INFORMATION: Article 8 of the U.S.-Brazil arrangement provides that if the U.S. determines that because of abnormal supply or demand factors, the U.S. steel industry will be unable to meet demand in the U.S.A. for a particular product (including substantial objective evidence such as allocation, extended delivery periods, or other relevant factors), an additional tonnage shall be allowed for such product.

We have received a short-supply request for railroad axles for freight cars, roller bearing, raised wheel seat, classification "F," as described in the Association of American Railroads Manual of Standards and Recommended Practices, Standard 1963, Revised 1984, Effective March 1, 1985.

Any party interested in commenting on this request should send written comments as soon as possible, and no later than September 9, 1988. Comments should focus on the economic factors involved in granting or denying this request.

Commerce will maintain this request and all comments in a public file. Anyone submitting business proprietary information should clearly so label the business proprietary portion of the submission and also provide a non-proprietary submission which can be placed in the public file. The public file will be maintained in the Central Records Unit, Room B-099, Import Administration, U.S. Department of Commerce, at the above address.

Timothy N. Bergan,

Acting Assistant Secretary for Import Administration.

[FR Doc. 88-19692 Filed 8-29-88; 8:45 am]

BILLING CODE 3510-DS-M

Minority Business Development Agency

Business Development Center Applications: Detroit, MI

AGENCY: Minority Business Development Agency.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under its Minority Business Development Center (MBDC) Program to operate an MBDC for approximately a 3 year period, subject to available funds. The cost of performance for the first (12) months is estimated at $322,500 in Federal funds and a minimum of $56,912 in non-federal contributions for the budget period April 1, 1989 thru March 31, 1990. Cost-sharing contributions may be in the form of cash contributions, client fees for services, in-kind contributions, or combinations thereof. The MBDC will operate in the Detroit, Michigan geographic service area. The award number of this MBDC will be 05-10-89004-01.

The funding instrument for the MBDC will be a coopertive agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program is designed to provide business development services to the minority business community for the establishment and operation of viable minority businesses. To this end, MBDA funds organizations that can coordinate and broker public and private resources on behalf of minority individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodology) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive.

MBDCs shall be required to contribute at least 15% of the total project cost through non-federal contributions. Client fees for billable management and technical assistance (M&TA) rendered must be charged by MBDCs. Based on a standard rate of $50 per hour, MBDCs will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less and 35% of the total cost for firms with gross sales of over $500,000.

The MBDC may continue to operate, after the initial competitive year, for up to 2 additional budget periods. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's satisfactory performance, the availability of funds and Agency priorities.

CLOSING DATE: The closing date for applications is October 21, 1988. Applications must be postmarked on or before October 21, 1988.

ADDRESS: Chicago Regional Office, Minority Business Development Agency, 55 East Monroe Street, Suite 1440, Chicago, Ilinois 60603, 312/353-0182.

FOR FURTHER INFORMATION CONTACT: David Vega, Regional Director, Chicago Regional Office.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Date: August 24, 1988.

David Vega,

Regional Director, Chicago Regional Office.

[FR Doc. 88-19625 Filed 8-29-88; 8:45 am]

BILLING CODE 3510-21-M

Business Development Center Applications: Kansas City, Missouri

AGENCY: Minority Business Development Agency.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under its Minority Business Development Center (MBDC) Program to operate an MBDC for approximately a 3 year period, subject to available funds. The cost of performance for the first (12) months is estimated at $184,260 in Federal funds and a minimum of $32,516 in non-federal contributions for the budget period April 1, 1989 thru March 31, 1990. Cost-sharing contributions may be in the form of cash contributions, client fees for services, in-kind contributions, or combinations thereof. The MBDC will operate in the Kansas City, Missouri geographic service area. The award number of this MBDC will be 07-10-89003-01.

The funding instrument for the MBDC will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program is designed to provide business development services to the minority business community for the establishment and operation of viable minority businesses. To this end, MBDC funds organizations that can coordinate and broker public and private resources on behalf of minority individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodology) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive.

MBDCs shall be required to contribute at least 15% of the total project cost through non-federal contributions. Client fees for billable management and technical assistance (M&TA) rendered must be charged by MBDCs. Based on a standard rate of $50 per hour, MBDCs will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less and 35% of the total cost for firms with gross sales of over $500,000.

The MBDC may continue to operate, after the initial competitive year, for up to 2 additional budget periods. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's satisfactory performance, the availability of funds and Agency priorities.

CLOSING DATE: The closing date for applications is October 21, 1988. Applications must be postmarked on or before October 21, 1988.

ADDRESS: Chicago Regional Office, Minority Business Development Agency, 55 East Monroe Street, Suite 1440, Chicago, Illinois 60603, 312/353-0182.

FOR FURTHER INFORMATION CONTACT: David Vega, Regional Director, Chicago Regional Office.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Date: August 24, 1988.

David Vega,

Regional Director, Chicago Regional Office.

[FR Doc. 88-19626 Filed 8-29-88; 8:45 am]

BILLING CODE 3510-21-M

Business Development Center Applications: Cincinnati/Dayton, OH

AGENCY: Minority Business Development Agency.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under its Minority Business Development Center (MBDC) Program to operate an MBDC for approximately a 3 year period, subject to available funds. The cost of performance for the first twelve (12) months is estimated at $184,260 in Federal funds and a minimum of $32,516 in non-federal contributions for the budget period March 1, 1989 to February 28, 1990. Cost-sharing contributions may be in the form of cash contributions, client fees for services, in-kind contributions, or combinations thereof. The MBDC will operate in the Cincinnati/Dayton, Ohio geographic service area. The award number of this MBDC will be 05-10-89002-01.

The funding instrument for the MBDC will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program is designed to provide business development services to the minority business community for the establishment and operation of viable minority businesses. To this end, MBDA funds organizations that can coordinate and broker public and private resources on behalf of minority individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodology) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive.

MBDCs shall be required to contribute at least 15% of the total project cost through non-federal contributions. Client fees for billable management and technical assistance (M&TA) rendered must be charged by MBDCs. Based on a standard rate of $50 per hour, MBDCs will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less and 35% of the total cost for firms with gross sales of over $500,000.

The MBDC may continue to operate, after the initial competitive year, for up to 2 additional budget periods. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's satisfactory performance, the availability of funds and Agency priorities.

CLOSING DATE: The closing date for applications is October 14, 1988. Applications must be postmarked on or before October 14, 1988.

ADDRESS: Chicago Regional Office, Minority Business Development Agency, 55 East Monroe Street, Suite 1440, Chicago, Illinois 60603, 312/353-0182.

FOR FURTHER INFORMATION CONTACT: David Vega, Regional Director, Chicago Regional Office.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Date: August 24, 1988.

David Vega,

Regional Director, Chicago Regional Office.

[FR Doc. 88-19627 Filed 8-29-88; 8:45 am]

BILLING CODE 3510-21-M

Business Development Center Applications: Cleveland, OH

AGENCY: Minority Business Development Agency.

ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under its Minority Business Development Center (MBDC) Program to operate an MBDC for approximately a 3 year period, subject to available funds. The cost of performance for the first (12) months is estimated at $184,280 in Federal funds and a minimum of $32,516 in non-federal contributions for the budget period April 1, 1989 thru March 31, 1990. Cost-sharing contributions may be in the form of cash contributions, client fees for services, in-kind contributions, or combinations thereof. The MBDC will operate in the Cleveland, Ohio geographic service area. The award number of this MBDC will be 05-10-89005-01.

The funding instrument for the MBDC will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program is designed to provide business development services to the minority business community for the establishment and operation of viable minority businesses. To this end, MBDA funds organizations that can coordinate and broker public and private resources on behalf of minority individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodology) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive.

MBDCs shall be required to contribute at least 15% of the total project cost through non-federal contributions. Client fees for billable management and technical assistance (M&TA) rendered must be charged by MBDCs. Based on a standard rate of $50 per hour, MBDCs will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less and 35% of the total cost for firms with gross sales of over $500,000.

The MBDC may continue to operate, after the initial competitive year, for up to 2 additional budget periods. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's satisfactory performance, the availability of funds and Agency priorities.

CLOSING DATE: The closing date for applications is October 21, 1988. Applications must be postmarked on or before October 21, 1988.

ADDRESS: Chicago Regional Office, Minority Business Development Agency, 55 East Monroe Street, Suite 1440, Chicago, Illinois 60603, 312/353-0182.

FOR FURTHER INFORMATION CONTACT: David Vega, Regional Director, Chicago Regional Office.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Date: August 24, 1988.

David Vega,

Regional Director, Chicago Regional Office.

[FR Doc. 88-19628 Filed 8-29-88; 8:45 am]

BILLING CODE 3510-21-M

National Oceanic and Atmospheric Administration

Evaluation of State/Territorial Coastal Management Program, Coastal Energy Impact Program, and National Estuarine Research Reserves

AGENCY: National Oceanic and Atmospheric Administration, National Ocean Service, Office of Ocean and Coastal Resource Managmeent.

ACTION: Notice of availability of evaluation findings.

SUMMARY: Notice is hereby given of the availability of the evaluation findings for the Mississippi, Alaska, Wisconsin, and Alabama Coastal Management Programs. Section 312 of the Coastal Zone Management Act of 1972, as amended (CZMA), requires a continuing review of the performance of each coastal state with respect to funds authorized under the CZMA and to the implementation of its federally approved Coastal Management Program. The states evaluated were found to be adhering to the programmatic terms of their financial assistance awards and/or to their approved coastal management program; and to be making progress on award tasks, special award conditions, and significant improvement tasks, special award conditions, and significant improvement tasks aimed at program implementation and enforcement, as appropriate. Accomplishments in implementing coastal zone management programs were occurring with respect to the national coastal management objectives identified in section 303(2)(A)-(I) of the Coastal Zone Management Act. A copy of the assessment and detailed findings for these programs may be obtained on request from: John H. McLeod, Evaluation Officer, Policy Coordination Division, Office of Ocean and Coastal Resource Management, National Ocean Service, NOAA, 1825 Connecticut Avenue NW., Washington, DC 20235 (telephone 202/673-5104).

Date: August 19, 1988.

John J. Carey,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

Federal Domestic Assistance Catalog 11.419 Coastal Zone Management Program Administration.

[FR Doc. 88-19593 Filed 8-29-88; 8:45 am]

BILLING CODE 3510-08-M

Coastal Zone Management Programs and Estuarine Sanctuaries: State Programs—Intent to Evaluate Performance

AGENCY: National Oceanic and Atmospheric Administration, National Ocean Service, Office of Ocean and Coastal Resource Management.

ACTION: Notice of intent to evaluate.

SUMMARY: The National Oceanic and Atmospheric Administration, National Ocean Service, Office of Ocean and

Coastal Resources Management (OCRM), announces its intent to evaluate the performance of the Washington Coastal Management Program (CMP), the North Carolina CMP, and the Rhode Island (Narragansett) National Estuarine Research Reserve through October 31, 1988. Evaluation of the coastal management program will be conducted pursuant to section 312 of the Coastal Zone Management Act of 1972, as amended, (CZMA) which requires a continuing review of the performance of coastal states with respect to coastal management, including detailed findings concerning the extent to which the state has implemented and enforced the program approved by the Secretary of Commerce, addressed the coastal management needs identified in section 303(2)(A) through (I) of the CZMA, and adhered to the terms of any grant, loan or cooperative agreement funded under the CZMA. Evaluation of the National Estuarine Research Reserves will be conducted pursuant to section 315(f) of the CZMA which requires the periodic review of the performance of each reserve with respect to its operation and management. The reviews involve consideration of written submissions, a site visit to the state, and consultations with interested Federal, state and local agencies and members of the public. Public meetings will be held as part of the site visits. The state will issue notice of these meetings. Copies of each state's most recent performance report, as well as the OCRM's notification letter and supplemental information request letter to the state are available upon request from the OCRM. Written comments from all interested parties on each of these programs to the contact listed below are encouraged at this time. OCRM will place subsequent notice in the **Federal Register** announcing the availability of the Final Findings based on each evaluation once these are completed.

FOR FURTHER INFORMATION CONTACT: John H. McLeod, Evaluation Officer, Policy Coordination Division, Office of Ocean and Coastal Resource Management, National Oceanic Service, NOAA, 1825 Connecticut Avenue, NW., Washington, DC 20235 (telephone: 202/673–5104).

Date: August 19, 1988.

John J. Carey,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

Federal Domestic Assistance Catalog 11.419

[FR Doc. 88–19594 Filed 8–29–88; 8:45 am]

BILLING CODE 3510-08-M

Permits; Pacific Coast Groundfish Fishery

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of issuance of an experimental fishing permit.

SUMMARY: This notice announces the issuance of an experimental fishing permit to the states of Washington and Oregon for the harvest of soupfin shark and other groundfish species with gillnets north of 38° N. latitude in the exclusive economic zone off the coasts of Washington and Oregon. The permit authorizes the use of experimental fishing gear to harvest groundfish which otherwise would be prohibited by federal regulations. This action is authorized by the Pacific Coast Groundfish Fishery Management Plan and implementing regulations.

EFFECTIVE DATES: July 15, 1988, through October 31, 1988.

ADDRESS: Rolland A. Schmitten, Director, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115.

FOR FURTHER INFORMATION CONTACT: William L. Robinson, 206–526–6140.

SUPPLEMENTARY INFORMATION: The Pacific Coast Groundfish Fishery Management Plan (FMP) and implementing regulations at 50 CFR Part 663 specify that experimental fishing permits (EFPs) may be issued to authorize fishing that otherwise would be prohibited by the FMP and regulations. The procedures for issuing EFPs are contained in the regulations at § 663.10.

An EFP application to harvest soupfin shark and other groundfish species using gillnets in the exclusive economic zone (EEZ) off the coasts of Washington and Oregon was received from the Washington Department of Fisheries (WDF) and the Oregon Department of Fish and Wildlife (ODFW) on May 16, 1988. Current groundfish regulations at § 663.26 do not authorize the use of gillnets north of 38° N. latitude to harvest groundfish. The states of Washington and Oregon are conducting an experimental fishery on thresher shark, a species that is not managed under the FMP, and requested that the vessels issued 1988 permits by the states also be issued a Federal EFP to authorize the retention and marketing of federally-managed sharks (soupfin, leopard, and spiny dogfish sharks) taken incidentally in the state experimental drift gillnet fishery for thresher sharks. A notice acknowledging receipt of the application, describing the proposal, and requesting public comment was published in the **Federal Register** on June 15, 1988 (53 FR 22371). No public comments were received. The application was considered by the Pacific Fishery Management Council, including the directors of the fishery management agencies of Washington, Oregon, California, and Idaho, at its July 1988 public meeting in Portland, Oregon. The Council and its advisory groups recommended that NMFS issue an EFP as requested in the joint application from Washington and Oregon. The NMFS Regional Director, after having considered all factors including the potential for entanglement of non-target species in the experimental gear, issued the EFP as recommended by the Council under the provisions of § 663.10.

The EFP authorizes the 34 state-permitted vessels to harvest soupfin, leopard and spiny dogfish shark taken incidentally in the state-regulated thresher shark drift gillnet fishery from July 15, 1988, through October 31, 1988, in the EEZ off the coasts of Washington and Oregon. Under the terms and conditions of the permit, the vessels must have a valid WDF or ODFW state permit which restricts the fishery to at least 20 miles offshore and limits the vessels to the use of one gillnet that is not to exceed 1,000 fathoms in length with a minimum 16-inch mesh. Permit holders are required to maintain detailed logs and allow a WDF or ODFW observer to accompany the vessel, if so requested.

Further details or a copy of the permit may be obtained from the NMFS Regional Director at the above address.

Authority: 16 U.S.C. 1801 *et seq.*

Ann D. Terbush,

Acting Director of Office Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 88–19653 Filed 8–29–88; 8:45 am]

BILLING CODE 3510-22-M

DEPARTMENT OF DEFENSE

Department of the Air Force

USAF Scientific Advisory Board; Meeting

August 22, 1988.

The USAF Scientific Advisory Board Ad Hoc Committee on Science and Technology (S&T) Roadmaps Review will meet on 28 Sept. 88 from 8:00 a.m. to 5:00 p.m. at the Pentagon, Washington, DC 20330–5430.

The purpose of this meeting is to review the roadmaps for the programs in the Air Force S&T base. This meeting will involve discussions of classified defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (202) 697–4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 88–18664 Filed 8–29–88; 8:45 am]

BILLING CODE 3910–01–M

Corps of Engineers, Department of the Army

[3710–EN]

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for a Proposed Regional Landfill Expansion in Non-tidal Wetlands in the City of Suffolk, VA

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice of Intent.

SUMMARY: An Environmental Impact Statement will be prepared to evaluate project alternatives and the public interest review factors for the proposed regional landfill expansion.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and DEIS can be answered by: Pamela Painter, U.S. Army Engineer District, Norfolk, 803 Front Street, Norfolk, Virigina 23510, (804) 441–7654.

SUPPLEMENTARY INFORMATION:

1. Proposed Action

The Southeastern Public Service Authority proposes a 440 acre expansion of an existing regional landfill which will involve the filling of an estimated 376 acres of non-tidal, seasonally-flooded palustrine forested wetlands which are a part of the Great Dismal Swamp, adjacent to Burnetts Mill Creek, a tributary of the Nansemond River in Suffolk, Virginia. The existing landfill will reach capacity by June 1992 unless measures are taken to increase its useful life (such as vertical expansion, additional recycling efforts and increased sales of refuse derived fuel). The proposed expansion will provide disposal capacity until the year 2016 for 24.5 million cubic yards of garbage.

2. Alternatives

Alternatives which will be investigated include, but will not be limited to, site alternatives in the service area, the construction of a mass burn facility, waste volume reduction through increased refuse derived fuel sales and/or recycling, combinations of some alternatives and no project.

3. Scope Process

A pre-application scoping meeting was held with State and Federal agencies in May 1988 and formal agency scoping comments were requested in July 1988. Significant issues which have been identified thus far include wetland destruction and impacts to a federally listed threatened species (the Dismal Swamp southeastern shrew). A public notice requesting written public comments will be published on or about August 10, 1988.

4. Public Scoping Meeting

If it is determined that a public scoping meeting is necessary to assist the Corps in identifying significant issues which should be addressed in the DEIS, the date and location of the meeting will be announced by separate public notice when scheduled.

5. DEIS Availability

It is estmated that the DEIS will be available to the public for review and comment in the spring of 1989.

Date: August 12, 1988.

J.J. Thomas,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 88–19598 Filed 8–29–88; 8:45 am]

BILLING CODE 3710–EN–M

DEPARTMENT OF EDUCATION

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Office of Information Resources Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATE: Interested persons are invited to submit comments on or before September 29, 1988.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Jim Houser, Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Margaret B. Webster, Department of Education, 400 Maryland Avenue, SW., Room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Margaret B. Webster, (202) 732–3915.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Director, Office of Information Resources Management, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following:

(1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invities public comment at the address specified above. Copies of the requests are available from Margaret Webster at the address specified above.

Dated: August 25, 1988.

Carlos U. Rice,

Director for Office of Information Resources Management.

Office of Education Research and Improvement

Type of Review: New

Title: Survey on the Use of Research and Development Resources—Fast Response Survey System

Affected Public: State or local governments

Frequency: One time only

Reporting Burden:

Responses: 1,000

Burden Hours: 500

Recordkeeping:

Recordkeepers: 0

Burden Hours: 0

Abstract: This survey will obtain information from school district concerning their use of research and development resource funded by the Department. The survey will provide information that will assist the Department's decisionmaking about the structure and types of serivces to be offered through the regional educational laboratory program in the future.

Office of Postsecondary Education

Type of Review: Revison
Title: Student Aid Report
Affected Public: Individuals or households; businesses or other for-profit; non-profit institutions
Frequency: Annually
Reporting Burden:
  Responses: 12,368,066
  Burden Hours: 2,021,655
Recordkeeping:
  Recordkeepers: 6,000
  Burden Hours: 436,367
Abstract: The Student Aid Report (SAR) is used to notify applicants of their eligibility to receive Federal financial aid. The form is submitted by eligible students to the participating institution of their choice. The institution submits Part 3 of the SAR to the Department to receive funds for the applicant.

Office of Postsecondary Education

Type of Review: Extension
Title: Request for Collection Assistance under Federal Insured Student Loan Program
Affected Public: State or local governments; businesses or other for-profit; non-profit institutions
Frequency: On occasion
Reporting Burden:
  Responses: 3,000
  Burden Hours: 990
Recordkeeping:
  Recordkeepers: 0
  Burden Hours: 0
Abstract: Lending institutions submit this form to request assistance in obtaining accurate addresses of borrowers under the Federal Insured Student Loan Program. The Department uses this information to obtain the borrower's current address in order for the lender to resume collection activity on the loan.

Office of Postsecondary Education

Type of Review: Extension
Title: Lender's Manifest for Federally Insured Loans
Affected Public: Businesses or other for-profit
Frequency: On occasion
Reporting Burden:
  Responses: 27,000
  Burden Hours: 5,400
Recordkeeping:
  Recordkeepers: 0
  Burden Hours: 0
Abstract: Lenders report the conversion of a loan to repayment and loans paid in full to the Department. Department uses the information to tract the status of loans under the Federal Insured Student Loan Program.

Office of Vocational and Adult Education

Type of Review: Revision
Title: State Plan for Adult Education
Affected Public: State or local governments
Frequency: Quadrennially
Reporting Burden:
  Responses: 54
  Burden Hours: 11,880
Recordkeeping:
  Recordkeepers: 0
  Burden Hours: 0
Abstract: State educational agencies submit State plans to receive Federal funds for adult education programs. The Department uses the information to determine grant eligibility and to ensure compliance with the Adult Education Act, as amended.

Office of Postsecondary Education

Type of Review: Reinstatement
Title: Application for Federal Assistance for the Strengthening Institutions Program
Agency Form Number: ED 851a
Frequency: Annually
Affected Public: Non-profit institutions
Reporting Burden:
  Responses: 365
  Burden Hours: 9,855
Recordkeeping:
  Recordkeepers: 0
  Burden Hours: 0
Abstract: This form will be used by institutions of higher education to apply for grants under the Strengthening Institutions Program. The Department uses this information to make grant awards to those institutions that are eligible.

Office of Postsecondary Education

Type of Review: New Collection
Title: Christa McAuliffe Fellowship Program Performance Report
Agency Form Number: NA
Frequency: Annually
Affected Public: Individuals
Reporting Burden:
  Responses: 115
  Burden Hours: 345
Recordkeeping:
  Recordkeepers: 0
  Burden Hours: 0
Abstract: The Department uses this information to determine that the Fellowship carried out the activities described in the approved application and met the service requirement of the Fellowship.

Office of Educational Research and Improvement

Type of Review: New
Title: Survey on Private School Early Estimates—Fast Response Survey System
Affected Public: Businesses or for-profit; non-profit institutions
Frequency: One time only
Reporting Burden:
  Responses: 1,000
  Burden Hours: 500
Recordkeeping:
  Recordkeepers: 0
  Burden Hours: 0
Abstract: This survey will obtain from a sample of private schools early estimates of key statistics that will be comparable to the Common Core of Data early estimates of public schools. The Department will use the data to develop a descriptive profile of users and providers in the American educational system.

[FR Doc. 88-19679 Filed 8-29-88; 8:45 am]
BILLING CODE 4000-01-M

Meetings: Education Intergovernmental Advisory Council

AGENCY: Intergovernmental Advisory Council on Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Executive Committee of the Intergovernmental Advisory Council on Education. This notice also describes the functions of the Council. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

DATE: September 20, 1988; 9:30 a.m.–4:00 p.m.

ADDRESS: Department of Education, Room 4003, 400 Maryland Avenue, SW., Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Gwen A. Anderson, Executive Director, Intergovernmental Advisory Council on Education, Room 3036, 400 Maryland Avenue, SW., Washington, DC, 20202-7576, 732-3844.

SUPPLEMENTARY INFORMATION: The Intergovernmental Advisory Council on Education was established under section 213 of the Department of Education Organization Act (20 U.S.C. 3423). The Council was established to provide assistance and make recommendations to the Secretary and the President concerning intergovernmental policies and relations pertaining to education.

The meeting of the Executive Committee is open to the public. The proposed agenda includes:

Old Business

—Discussion of FY 1988 Conference Report
—Other Old Business

New Business

—Discussion of FY 1989 Conference Report
—Other New Business

Records are kept of all Council proceedings, and are available for public inspection at the Office of the Intergovernmental Advisory Council on Education, Room 3036, 400 Maryland Avenue, SW., Washington, DC, 20202–7576, from the hours of 9:00 a.m. to 5:00 p.m.

Dated: August 24, 1988.

Michelle Easton,

Acting Deputy Under Secretary of Intergovernmental and Interagency Affairs.

[FR Doc. 88–19583 Filed 8–29–88; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Finding of No Significant Impact; Transuranic Waste Management Activities at the Savannah River Plant, Aiken, SC

AGENCY: Department of Energy.

ACTION: Finding of No Significant Impact.

SUMMARY: The Department of Energy (DOE) has prepared an environmental assessment (EA), DOE/EA–0315, for transuranic (TRU) waste management activities at DOE's Savannah River Plant (SRP), including the construction and operation of a new TRU Waste Processing Facility. Based on the analyses in the EA, DOE has determined that the proposed action is not a major Federal action significantly affecting the quality of the human environment, within the meaning of the National Environmental Policy Act (NEPA) of 1969. Therefore, the preparation of an environmental impact statement is not required and the Department is issuing this Finding of No Significant Impact (FONSI).

Copies of the EA are available from: Mr. Stephen Wright, Director, Environmental Division, U.S. Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, South Carolina 29801, (803) 725–3957.

FOR FURTHER INFORMATION CONTACT: Carol Borgstrom, Director, Office of NEPA, Project Assistance, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–4600

Proposed Action: The proposed action involves: (1) Retrieval of stored TRU waste; (2) construction and operation of the TRU Waste Processing Facility (TMF) to process, if necessary, the SRP retrievably-stored and newly-generated waste; and (3) repackaging, certification and shipment of SRP TRU waste to the Waste Isolation Pilot (WIPP), near Carlsbad, New Mexico. The WIPP is a DOE research and development facility designed to demonstrate the safe and environmentally acceptable disposal of radioactive waste from national defense programs. After a five year demonstration phase of operations, scheduled to begin in late 1988, a decision will be made on conversion of the WIPP to a permanent repository for TRU waste.

The proposed action for the SRP TRU waste is consistent with the objectives stated in the "Final Environmental Impact Statement, Waste Isolation Pilot Plant" (DOE/EIS–0026), and will enable SRP to eliminate interim TRU waste storage and the risk of groundwater contamination or air emissions resulting from storage container failure.

TRU waste is radioactive waste from the production of nuclear materials which is contaminated with more than 100 nCi of transuranium elements per gram of waste. SRP TRU waste includes hazardous waste components, such as used oils, which are classified as mixed wastes and are subject to the requirements of the Resource Conservation and Recovery Act (RCRA). SRP will comply with RCRA requirements for mixed waste treatment, storage, and shipping. Compliance with RCRA requirements will not affect the environmental impacts of the management of stored and retrievable TRU waste at SRP.

Proposed TRU waste retrieval activities at SRP will use earthmoving equipment to remove the top three feet of the four-foot soil cover over burial ground storage pads. The remaining soil will be removed with a remotely operated High Efficiency Particulate Air-filtered soil vacuum. Shielded lifting canisters will be used where possible to lift the waste containers from the pads and into shipping casks for transportation to the new processing facility.

The TWF will be located near the center of the SRP plant site in a chemical separations area which is near SRP burial grounds containing TRU waste. The new facility will process newly-generated and stored TRU waste as necessary to meet WIPP criteria. It is designed to vent, purge, x-ray, and assay the waste storage containers. It will reduce the size of large waste and solidify liquids as necessary. It will then repackage the waste to meet WIPP waste acceptance criteria requirements for shipment and emplacement is the WIPP. TRU waste will be reclassified in an existing SRP waste certification facility (WCF) as either WIPP-certified waste or low-level waste. WIPP-certified waste will be shipped to WIPP and low-level waste will be disposed onsite in accordance with the requirements pertaining to disposal of low-level radioactive waste.

As of December 1987, SRP had approximately 370,000 cubic feet of TRU waste, 56% (207,000 cubic feet) of which is in interim storage. TRU waste which is retrievably stored is in galvanized steel drums on concrete pads or contained in concrete and steel boxes, concrete culverts and galvanized steel drums buried in shallow trenches. The remaining SRP TRU waste is buried as non-retrievable waste. The waste is not currently scheduled to be shipped to WIPP. Management of the nonretrievable TRU waste is not within the scope of the current proposed action but was evaluated in a separate SRP NEPA evaluation, "Final Environmental Impact Statement, Waste Management Activities for Groundwater Protection", (DOE/EIS–0120).

Some newly-generated waste which meets WIPP requirements without processing will be certified in the WCF and is scheduled to be shipped to WIPP starting in 1989. Shipment to WIPP of TRU waste which is retrieved from interim storage is scheduled to begin in 1995. Drums of TRU waste certified to meet WIPP criteria will be transported from SRP to WIPP in double-walled containers referred to as TRUPACTs (Transuranic Package Transporters) which incorporate a double-walled design to protect the cargo against collision, puncture, and fire in case of accident. The TRUPACT design will be certified by the Nuclear Regulatory Commission and will meet the requirements of DOE Order 5480.3 "Safety Requirements for the Packaging and Transportation of Hazardous Materials, Hazardous Substances and Hazardous Wastes."

Distances for shipments to WIPP were estimated using an Oak Ridge National Laboratory highway routing model. Potential routings maximized the use of interstate highways from SRP to the New Mexico area within New Mexico to the WIPP facilities near Carlsbad. Potential rail routings were taken from a DOE transportation assessment and guidance report, "Transuranic Waste Transportation Assessment and Guidance Report", (DOE/JIO–002, 1986).

Environmental Impacts

The potential environmental consequences of the proposed action were analyzed for several categories of activities which included: (1) Construction of the TWF; (2) waste retrieval and processing operations; and (3) transportation of waste to WIPP. No significant impacts were determined in any category under routine or accident conditions. The results of the analysis are summarized below.

Construction: The TWF will occupy four and a half acres of previously developed land in H-Area. No new land or structures will be required for retrieval activities in SRP burial grounds. Very minor construction impacts will be experienced onsite. The peak construction work force of 28 workers will have minimal effects on area land use, housing and social services. No significant impacts are expected on ecological resources or archaeological or historical sites.

Retrieval and Processing Operations: Once operational, the new facility will employ 40 people, many already employed at SRP. Liquid wastes from TWF processing operations will be recovered to prevent the release to the environment of low-level radioactive materials. After filtering, routine radioactive airborne releases from the new facility will be extremely small and well within applicable Federal standards. Annual releases to the atmosphere are estimated to be less than 6.7E–05 Ci of plutonium 238 and/or 239. At the plant boundary, the annual maximum individual dose from such releases is projected to be 3.5 E–04 mrem, which is several orders of magnitude below the U.S. Environmental Protection Agency standard of 25 mrem/year for routine radiological releases to the atmosphere (40 CFR 61) and the DOE routine operations standard of 100 mrem/year from all potential exposure pathways (DOE Order 5480.1A). No significant offset impacts are anticipated in connection with routine waste retreval operations.

Routine operations will result in small radiation exposures to the operating personnel. The average occupational dose for routine TRU waste retrieval and processing activities was estimated as 0.22 rem/year. This rate of exposure is well below the DOE annual occupational limit of 5 rem (DOE Order 5480.1A).

The most severe credible accident (fire in a storage culvert in an SRP burial ground trench) would result in a maximum individual dose at the SRP boundary) of 4.4 rem, which is well below the DOE siting guidlines of 25 rem for routine postulated accidental releases for nonreactor nuclear facilities (DOE Order 6430.1 Chapter 1).

Transportation Impacts: For truck and rail shipments of TRU wastes from SRP to WIPP the truck drivers, train crew and population along the route are potentially exposed to low levels of radiation penetrating the transportation package. As previously stated, transportation of TRU waste would be conducted in NRC-licensed shipping containers designed to withstand the most severe accidents without releasing their contents. The maximum calculated does to the onsite and offsite population under routine and accident conditions is projected to be 3.9 person-rem/year (by truck), which is insignificant in comparison to a natural background exposure to the same population of 105,000 person-rem/year. The greatest risk from transportation is nonradiological resulting from trauma associated with vehicle collisions/accidents. However, as an added precaution against radiological risk, overall emergency response plans and procedures are being developed by the Department to address WIPP related transportation accidents.

Alternatives Considered

In the EA, DOE considered the following alternatives to the proposed action of retrieving stored TRU waste and constructing the new processing facility at SRP for shipment of SRP TRU waste to WIPP: no action, periodic container overpacking, onsite disposal, and shipment of unprocessed waste to WIPP.

The no action alternative was determined to be unacceptable because storage containers will deteriorate over time, increasing the potential for container failure and contamination of the environment. The container overpack alternative was determined to be undesirable because TRU waste processing and disposal would be postponed until a later date, increasing the potential for container failure and environmental contamination. In addition, neither of these alternatives would provide for the permanent disposal of TRU waste.

Studies have not been conducted at SRP specifically to determine the technical feasibility of disposing of TRU wastes onsite. Although it is believed that TRU wastes could be disposed in properly engineered concrete vaults onsite, no studies are planned to investigate their onsite disposal because DOE believes that offsite geologic disposal of SRP TRU wastes is environmentally preferable to near surface disposal at SRP. The alternative of transporting unprocessed waste to WIPP was not selected because this waste would not meet WIPP acceptance criteria, thus requiring it to be shipped to an existing processing facility at the Idaho National Engineering Laboratory for final processing before shipment to WIPP. This alternative would result in tripling shipping distances, with corresponding increases in environmental and accidental risk and costs.

Determination:

The proposed TRU waste retrieval and processing activities at SRP, including the proposed TRU waste processing facility, and the subsequent transportation of TRU wastes to WIPP, do not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act. This finding is based on the analyses in the EA. Therefore, an Environmental impact Statement for the proposed action is not required.

Issued at Washington, DC, this 24th day of August, 1988.

Ernest C. Baynard III,

Assistant Secretary, Environment, Safety and Health.

[FR Doc. 88–19711 Filed 8–29–88; 8:45 am]

BILLING CODE 6450-01-M

Office of Civilian Radioactive Waste Management

Start of the Public Comment Period for the Initial Version of the Dry Cask Storage Study

AGENCY: Office of Civilian Radioactive Waste Management; Energy.

ACTION: Notice of public comment period.

SUMMARY: In accordance with the requirements of section 5064 of the Nuclear Waste Policy Amendments Act of 1987 (Pub. L. 100–203), the Department of Energy's (DOE) Office of Civilian Radioactive Waste Management (OCRWM) has prepared an initial version of a report on the study and evaluation of the use of dry cask storage (and other technologies currently being considered) at reactor sites to meet the utility industry's spent nuclear fuel storage needs through the start of operation of a permanent geologic repository (year 2003). As announced in the April 26, 1988 **Federal Register**, the OCRWM, as part of this study, is soliciting the views of State and local governments and the public on this initial version of the report. The public comment period will close on October 28, 1988.

Comments received after that time will be considered to the extent possible. Those interested in receiving a copy of the report or submitting comments should write to the DOE contact listed below.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Head, U.S. Department of Energy, Office of Civilian Radioactive Waste Management, RW-322, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585

SUPPLEMENTARY INFORMATION: This notice is intended to facilitate the participation of State and local governments and the public by informing them of the study and its objectives, and notifying them that the initial version of the report is available for their review and comment. On April 26, 1988, a notice was posted in the **Federal Register** announcing the DOE's intent to release this initial version and requesting that those interested in commenting on the report submit a request for a copy to the DOE.

The initial version of the report is now available, and those who responded to the April 26 notice will automatically receive a copy. Others interested in receiving a copy or submitting comments should write to the DOE contact listed above. The public comment period will close on October 28, 1988.

After reviewing the comments received, the Department will make appropriate modifications to the report before it is submitted to the Congress. Comments received before or during the public comment period will be included in a comment appendix to the report and, if time permits, a summary of comments may be included in the body of the report.

The report is a study and evaluation of the use of dry cask storage (and other technologies currently being considered) at reactor sites to meet the utility industry's spent nuclear fuel storage needs through the start of operation of a permanent geologic repository (year 2003). Consistent with the guidance from the Congress, the objectives of the study are:

1. To consider the costs of dry cask storage technology, the extent to which dry cask storage at reactor sites will affect human health and the environment, the extent to which storage at reactor sites affects the cost and risk of transporting spent nuclear fuel to a central facility such as a monitored retrievable storage facility, and any other factors that are considered appropriate.

2. To consider the extent to which amounts in the Nuclear Waste Fund can be used, and should be used, to provide funds to construct, operate, maintain, and safeguard spent nuclear fuel in dry cask storage at reactor sites.

3. To consult with the Nuclear Regulatory Commission and include its views in the report.

4. To solicit the views of State and local governments and the public.

Issued in Washington, DC August 22, 1988.

Charles E. Kay,

Acting Director, Office of Civilian Radioactive Waste Management.

[FR Doc. 88-19712 Filed 8-29-88; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket Nos. ER88-380-000 et al.]

Minnesota Power & Light Co. et al.; Electric Rate, Small Power Production, and Interlocking Directorate Fillings

Take notice that the following filings have been made with the Commission:

1. Minnesota Power & Light Company

[Docket No. ER88-380-000]

August 24, 1988.

Take notice that on July 18, 1988, Minnesota Power & Light Company tendered for filing, pursuant to a Deficiency Letter dated June 16, 1988, a compliance filing with revised Interchange Service Agreement amendments which contain appropriate modifications.

Comment date: September 8, 1988, in accordance with Standard Paragraph E at the end of this notice.

2. Pacific Gas and Electric Company

[Docket No. ER88-219-000]

August 24, 1988.

Take notice that on July 11, 1988, Pacific Gas and Electric Company (PG&E) tendered for filing a bridge agreement with Turlock Irrigation District (Turlock) for the period of April 1, 1988, through June 30, 1988. PG&E states that is complying with FERC's stated desire to have on file agreements between PG&E and its wholesale customers.

Comment date: September 1, 1988, in accordance with Standard Paragraph E at the end of this notice.

3. Boston Edison Company

[Docket Nos. ER84-705-000 and ER87-581-000]

August 24, 1988.

Take notice that on August 12, 1988, Boston Edison Company (Company) tendered for filing a revision to its Rate S-8/Step C and costs of service studies filed on June 24, 1988. The Company states that it did not reduce the calculation of rate base to reflect the partial deductibility of decommissioning expense as provided for by the Deficit Reduction Act of 1984. The adjustment of the rate base calculation has required the Company to correct the following portions of its June 24 filing:

Enclosure A: Narrative, page 1.
Enclosures B, E and G: Statement BG, Demand Rate and Energy Rate.
Enclsoures C, F and H: Statement AF-1 (not included in the 6/24/88 filing); Statements BK, BK-1 and BK-2; Statement BK-R, Schedules 1, 2, 6, 9, 14 and 18.
Enclosure D: Tariffs, page 1.
Enclosure J: Workpapers 2, 4 and 5; workpaper 6 (new).

Comment date: September 6, 1988, in accordance with Standard Paragraph E at the end of this notice.

4. Cogen Technologies, Inc.

[Docket No. QF88-485-000]

August 25, 1988.

On August 9, 1988, Cogen Technologies, Inc. (Applicant), of 1600 Smith Street, Suite 5000, Houston, Texas 77002, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located in Everett, Massachusetts. The facility will consist of a combustion turbine generating unit, a heat recovery steam generator, and an extraction/condensing steam turbine generating unit. Process steam produced by the facility will be sold to Monsanto Petrochemical complex for its use in various process requirements. The primary energy source will be natural gas. The net electric power production capacity of the facility will be 52.65 MW. Installation of the facility will begin in March 1990.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

5. Lederle Laboratories

[Docket No. QF88-459-000]

August 25, 1988.

On August 8, 1988, Lederle Laboratories (Applicant), of Middletown Road, Pearl River, New York 10965, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located in Pearl River, New York. The facility will consist of two combustion turbine generating units and two heat recovery steam generators equippped with supplementary firing duct burners. Steam produced by the facility will be used for manufacturing processes, space heating and cooling. The primary energy source will be natural gas. The net electric power production capacity of the facility will be 16.6 MW. Installation of the facility was expected to begin in the second quarter of 1988.

Comment date: Thirty days from publication in the **Federal Register**, in accordance with Standard Paragraph E at the end of this notice.

6. Harold A. Wentworth, Jr.

[Docket No. ID-2372-000]

August 26, 1988.

Take notice that on August 15, 1988, Harold A. Wentworth, Jr. tendered for filing an application for authorization under section 305(b) of the Federal Power Act and Part 45 of the Regulations of the Federal Energy Regulatory Commission to hold the following interlocking positions:

Position and Corporation

Vice President—Electric Operations;
Louisville Gas and Electric Company.
Vice President—Electric Operations;
Ohio Valley Transmission Corporation.

Comment date: September 12, 1988, in accordance with Standard Paragraph E at the end of this notice.

7. Idaho Power Company

[Docket No. ER88-571-000]

August 26, 1988.

Take notice that on August 19, 1988, Idaho Power Company (Idaho Power) tendered for filing the Average System Cost (ASC) determined by the Bonneville Power Administration (BPA), BPA's written ASC report, and Idaho Power's ASC schedules (Appendix 1) for Idaho Power's Idaho exchange jurisdiction. Idaho Power also submitted its agreement with and/or objections to BPA's Average System Cost determination.

The ASC rates filed have been determined pursuant to the Revised Average System Cost Methodology approved by the Commission in its Order No. 400 issued October 1, 1984 in Docket No. RM84-16-000, and section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 830-839h). This act provides for the exchange of electric power between Idaho Power and BPA for the benefit of Idaho Power's residential and farm customers.

A copy of the filing has been served upon BPA and all parties to Idaho Power's Appendix 1 filing with BPA.

Comment date: September 12, 1988, in accordance with Standard Paragraph E at the end of this notice.

8. Kansas City Power & Light Company

[Docket No. ER88-572-000]

August 26, 1988.

Take notice than on August 22, 1988, Kansas City Power & Light Company (KCPL) tendered for filing an Amendatory Agreement No. 1 to Wholesale Firm Power Contract, between KCPL and Missouri Public Service Company dated August 17, 1988. KCPL states that the Amendatory Agreement provides for an extension of the contract term and modified rate design for firm power service.

KCPL requests an effective date of the date of filing, and therefore requests waiver of the Commission's notice requirements.

Comment date: September 12, 1988, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 or the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,
Acting Secretary.

[FR Doc. 88-19620 Filed 8-29-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP88-682-000, et al.]

Trunkline Gas Co. et al.; Natural gas certificate filings

August 23, 1988.

Take notice that the following filings have been made with the Commission:

1. Trunkline Gas Company

[Docket No. CP88-682-000]

Take notice that on August 15, 1988, Trunkline Gas Company (Trunkline), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP88-682-000 a prior notice request pursuant to Sections 157.205 and 284.223 of the Commission's Regulations for authorization to transport natural gas on a firm basis on behalf of National Steel Corporation (National), an end-user, under its blanket certificate issued in Docket No. CP86-586-000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Trunkline states that it proposes to transport up to 18,000 Dt of natural gas per day on a firm basis on behalf of National pursuant to a gas transportation agreement dated July 1, 1988, (Agreement). The Agreement provides for Trunkline to transport the gas from various points of receipt on its system in Illinois, Louisiana, offshore Louisiana, Tennessee and Texas and redeliver the gas, less fuel use and unaccounted for line loss, to Panhandle Eastern Piper Line Company (Panhandle) in Douglas County, Illinois for transportation to National.

Trunkline further states that the estimated daily and estimated annual quantities to be transported would be 18,000 Dt and 6,570,000 Dt, respectively. Trunkline asserted that service under § 284.223(a) commenced on July 1, 1988, as reported in Docket No. ST88-4730.

Comment date: October 7, 1988, in accordance with Standard Paragraph G at the end of this notice.

2. Panhandle Eastern Pipe Line Company

[Docket No. CP88-681-000]

Take notice that on August 15, 1988, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP88-681-000 a prior notice request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations for authorization to transport natural gas on a firm basis on behalf of National Steel Corporation (National), an end-user, under its blanket certificate issued in Docket No. CP86-585-000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Panhandle states that it proposes to transport up to 18,000 Dt of natural gas per day on a firm basis on behalf of National pursuant to a gas transportation agreement dated July 1, 1988, (Agreement). The Agreement provides for Panhandle to receive the gas from Trunkline Gas Company (Trunkline), in Douglas County, Illinois and redeliver the gas, less fuel use and unaccounted for line loss, to Michigan Consolidated Gas Company and National, in Wayne County, Michigan.

Panhandle further states that the estimated daily and estimated annual quantities of gas to be transported would be 18,000 Dt and 6,570,000 Dt, respectively. Panhandle asserted that service under § 284.223(a) commenced on July 1, 1988, as reported in Docket No. ST88-4720.

Comment date: October 7, 1988, in accordance with Standard Paragraph G at the end of this notice.

3. Panhandle Eastern Pipe Line Company

[Docket No. CP88-674-000]

Take notice that on August 12, 1988, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas, 77251, filed in Docket No. CP88-674-000, an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to partially abandon sales service to certain existing jurisdictional sales customers, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Panhandle proposes to partially abandon sales service to seven sales customers: Great River Gas Company (Great River), Michigan Gas Utilities (MGU), Citizens Gas Fuel Company (Citizens), Battle Creek Gas Company (Battle Creek), Northern Indiana Fuel and Light Company, Inc. (NIFL), Southeastern Michigan Gas Company (SEMCO), and Ohio Gas Company (Ohio Gas). Panhandle states that the seven sales customers have elected under § 284.10 of the Commission's regulations to convert a portion of its daily Contract Demand (CD) to firm transportation effective as of April 1, 1988. Panhandle explains that the firm transportation would be rendered under the terms and conditions of its Rate Schedule PT. Accordingly, Panhandle proposes to reduce the seven customers' current daily sales contract quantity as follows, to be effective April 1, 1988.

Customer	*Monthly CD (Mcf/d) reduction*
Great River	1,049
MGU	3,004
Citizens	1,214
Battle Creek	3,430
NIFL	1,432
SEMCO	3,933
Ohio Gas	3,947

Comment date: September 13, 1988, in accordance with Standard Paragraph F at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed wihtin the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 88-19621 Filed 8-29-88; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL 3437-1]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Requests (ICRs) abstracted below have been forwarded to the Office of Management (OMB) for review and are available to the public for review and comments. The ICRs describe the nature of the information collection and their expected cost and burden; where appropriate, they include the actual data collection instrument.

FOR FURTHER INFORMATION CONTACT: Carla Levesque at EPA (202) 382-2740.

SUPPLEMENTARY INFORMATION:

Office of Research and Development

Title: Health Significance of Bacteria Found in Point-of-Entry Granular Activated Filters. (EPA ICR 1473).

Abstract: The study will provide guidelines for the certification of filter devices used in household potable water lines at point-of-entry. Volunteer respondents will be asked to complete a monthly personal health diary to provide information needed in assessing whether these filters will change the frequency of respiratory illness within the sample population.

Burden Statement: The estimated public reporting burden for this collection of information is 5.2 hours per respondent per year. This estimate includes an initial telephone interview, completing a home identification questionnaire, and maintaining a monthly health diary.

Respondents: Households

Estimated No. of Respondents: 160

Estimated Total Annual Burden on Respondents: 287 hours

Frequency of Collection: 13 responses per year

Office of Solid Waste and Emergency Response—Region 5

Title: Gray Iron Foundry Waste Management Information. (EPA ICR 1484).

Abstract: This collection is designed to identify gray iron foundries that have not submitted proper notification of facility generation, treatment, storage or disposal of hazardous wastes under the Resource Conservation and Recovery Act (RCRA). Foundries contacted by EPA will be required to respond by letter to question concerning their usage of hazardous materials.

Burden Statement: The estimated public reporting burden for this collection of information is 6 hours per respondent per year. This estimate includes the time to review instructions, researching existing data sources, process/compile data, and complete letter.

Respondents: Gray iron foundries operating within EPA Region 5

Estimated No. of Respondents: 254

Estimated Total Annual Burden on Respondents: 1,524 hours

Frequency of Collection: 1 time per response

Send comments regarding the burden estimates, or any other aspects of these collections of information, including suggestions for reducing the burden, to:

Carla Levesque, Environmental Protection Agency, Information Policy Branch (PM-223), 401 M St., SW., Washington, DC 20460.

and

Nicolas Garcia (ICR) 1473) and Marcus Peacock (IRC 1484), Office of Management and Budget, Office of Information and Regulatory Affairs, 726 Jackson Place, NW., Washington, DC 20503, (Telephone (202) 395-3084).

Date: August 21, 1988.

Paul Lapsley,

Director, Information and Regulatory Systems Division.

[FR Doc. 88-19631 Filed 8-29-88; 8:45 am]

BILLING CODE 6560-50-M

[FIFRA Docket Nos. 625, et al.; (FRL-3436-6)]

Pesticide Products Containing Inorganic Arsenicals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Objections and Requests for Hearing.

Notice is hereby given, pursuant to § 164.8 of the Rules of Practice, 40 CFR 164.8, promulgated under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 *et seq.*, that certain registrants have filed objections to and have requested a hearing on the Administrator's notice of intent to cancel the registrations for pesticide products containing inorganic arsenicals registered for non-wood preservative use publish in the **Federal Register** on June 30, 1988, 53 FR 24787. These proceedings have been consolidated for hearing by order of the Chief Administrative Law Judge dated August 24, 1988.

For information concerning the issues involved and other details of these proceedings, interested persons are referred to the dockets of these proceedings on file with the Hearing Clerk, Environmental Protection Agency, (Mail Code A-110); Room 3708, Waterside Mall, 401 M Street, SW., Washington, DC 20460. (202-382-4865).

Dated: August 24, 1988.

Gerald Harwood,

Chief Administrative Law Judge.

[FR Doc. 88-19632 Filed 8-29-88; 8:45 am]

BILLING CODE 6560-50-M

[OW-FRL-3436-8]

Water Quality Criteria; Request for Comments

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Ambient Water Quality Criteria Document.

SUMMARY: EPA announces the availability and provides a summary of the final ambient water quality criteria document for aluminum. These criteria are published pursuant to section 304(a)(1) of the Clean Water Act. These water quality criteria may form the basis for enforceable standards.

Availability of Document:

This notice contains a summary of the final aluminum criteria document containing final ambient water quality criteria for the protection of aquatic organisms and their uses. Copies of the complete criteria document may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161 (phone number ((703) 487-4650). The NTIS publication order number for the document is published below. This document is also available for public inspection and copying during normal business hours at the Public Information Reference Unit, U.S. Environmental Protection Agency, Room 2404 (rear), 401 M Street SW., Washington, DC 20460. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

Copies of this document are also available for review in the EPA Regional Office libraries. Copies of the document are not available from the EPA office listed below. Requests sent to that office will be forwarded to NTIS or returned to the sender.

1. Ambient Water Quality Criteria for Aluminum--EPA 440/5-86-008; NTIS Number PB.

FOR FURTHER INFORMATION CONTACT: Dr. Frank Gostomski, Criteria and Standards Division (WH-585), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-7321.

SUPPLEMENTARY INFORMATION:

Background

Section 304(a)(1) of the Clean Water Act (33 U.S.C. 1314(a)(1) requires EPA to publish and periodically update ambient water quality criteria. These criteria are to reflect the latest scientific knowledge on the identifiable effects of pollutants on public health and welfare, aquatic life, and recreation.

EPA has periodically issued ambient water quality criteria, beginning in the 1973 with publication of the "Blue Book" (Water Quality Criteria 1972). In 1976, the "Red Book" (Quality Criteria for Water) was published. On November 28, 1980 (45 FR 79318), and February 15, 1984 (49 FR 5831), EPA announced the publication of 65 individual ambient water quality criteria documents for pollutants listed as toxic under section 307(a)(1) of the Clean Water Act.

EPA issued nine individual water quality criteria documents on July 29, 1985 (50 FR 30784) which updated or revised criteria previously published in the "Red Book" or in the 1980 water quality criteria documents. A revised version of the "National Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses" was announced at the same time. A bacteriological ambient water quality criteria document was published on

March 7, 1986 (51 FR 8012). A water quality criteria document for dissolved oxygen was published on June 24, 1986 (51 FR 22978). All of the publications cited above were summarized in "Quality Criteria for Water, 1986 which was released by the Office of Water Regulations and Standards on May 1, 1986. Final water quality criteria documents for chlorpyrifos, nickel, pentachlorophenol, parathion, and toxaphene were issued by EPA on December 3, 1986 (51 FR 43665). A final criteria document for zinc was issued on March 2, 1987 (52 FR 6213). A final criteria document for selenium was issued on January 5, 1988 (53 FR 177). A final criteria document for chlorides was issued on May 26, 1988 (53 FR 19028).

Today EPA is announcing the availability of a final water quality criteria document for aluminum. A draft criteria document for aluminum was made available for public comment on March 11, 1986 (51 FR 8361). These final criteria have been derived after consideration of all comments received and after analysis of additional toxicity data which EPA received after the draft document was published. Inclusion of the additional toxicity data resulted in a lowering of the criteria recommended in the draft document. The new toxicity studies utilized by EPA in deriving the final aluminum criteria are specifically cited in the criteria document. The Agency invites comment on these studies. The Aluminum Association has commented that the toxicity of aluminum may be affected by a number of site-specific factors such as pH, hardness and the presence of organic material in the water, and they are considering a research program which focuses on these relationships. If data on these factors become available, the States may choose to consider them, along with any site specific or other new data that may become available, in setting State water quality standards. Those data as well as any other information which might be useful, will also be evaluated for any future revision of the aluminum criteria.

Dated: August 3, 1988.

Rebecca W. Hanmer,

Acting Assistant Administrator for Water.

Appendix A—Summary of Water Quality Criteria for Aluminum National Criteria

The procedures described in the "Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses" indicate that, except possibly where a locally important species is very sensitive, freshwater aquatic organisms and their uses should not be affected unacceptably, when the pH is between 6.5 and 9.0, if the four-day average concentration of aluminum does not exceed 87 μg/L more than once every three years on the average and if the one-hour average concentration does not exceed 750 μg/L more than once every three years on the average.

Implementation

Because of the variety of forms of aluminum in ambient water and the lack of definitive information about their relative toxicities to freshwater species no available analytical measurement is known to be ideal for expressing aquatic life criteria for aluminum. Previous aquatic life criteria for metals and metalloids were expressed in terms of the total recoverable measurement but newer criteria for metals and metalloids have been expressed in terms of the acid-soluble measurement. Acid-soluble aluminum (operationally defined as the aluminum that passes through a 0.45 um membrane filter after the sample has been acidified to a pH between 1.5 and 2.0 with nitric acid) is probably the best measurement at the present for the following reasons:

1. This measurement is compatible with nearly all available data concerning toxicity of aluminum to, and bioaccumulation of aluminum by, aquatic organisms. It is expected that the results of tests used in the derivation of the criteria would not have changed substantially if they had been reported in terms of acid soluble aluminum.
2. On samples of ambient water, measurements of acid soluble aluminum will probably measure all forms of aluminum that are toxic to aquatic life or can be readily converted to toxic forms under natural conditions. In addition, this measurement probably will not measure several forms, such as aluminum that is occluded in minerals, clays, and sand or is strongly sorbed to particulate matter, that are not toxic and are not likely to become toxic under natural conditions. Although this measurement (and many others) will measure soluble complexed forms of aluminum, such as the EDTA complex of aluminum, that probably have low toxicities to aquatic life, concentrations of these forms probably are negligible in most ambient water.
3. Although water quality criteria apply to ambient water the measurement used to express criteria is likely to be used to measure aluminum in aqueous effluents. Measurement of acid-soluble aluminum is expected to be applicable to effluents because it will measure precipitates, such as carbonate and hydroxide precipitates of aluminum, that might exist in an effluent and dissolve whan the effluent is diluted with receiving water. If desired, dilution of effluent with receiving water before measurement of acid-soluble aluminum might be used to determine whether the reviewing water can decrease the concentration of acid soluble aluminum because of sorption.
4. The acid-soluble measurement is expected to be useful for most metals and metalloids, thus minimizing the number of samples and procedures that are necessary.
5. The acid-soluble measurement does not require filtration of the sample at the time of collection, as does the dissolved measurement.
6. The only treatment required at the time of collection is preservation by acidification to a pH between 1.5 and 2.0, similar to that required for the total recoverable measurement.
7. Ambient waters have much higher buffer intensities at a pH between 1.5 and 2.0 than they do at a pH between 4 and 9.
8. Durations of 10 minutes to 24 hours between acidification and filtration of most samples of ambient water probably will not affect the result substantially.
9. Differences in pH within the range of 1.5 and 2.0 probably will not affect the result substantially.
10. The acid-soluble measurement does not require a digestion step, as does the total recoverable measurement.
11. After acidification and filtration of the sample to isolate the acid-soluble aluminum, the analysis can be performed using either atomic absorption spectrophotometric or ICP-atomic emmission spectrometric analysis, as with the total recoverable measurement.

Thus, expressing aquatic life criteria for aluminum in terms of the acid-soluble measurement has both toxicological and practical advantages. The U.S. EPA is considering development and approval of an analytical method such as acid-soluble.

The 0.45 μm membrane filter is the usual basis for an operational definition of "dissolved", at least in part because filters with smaller holes often clog rapidly when natural water samples are filtered. Some particulate and colloidal material, however, passes through a 0.45 μm filter. The intent of the acid-soluble measurement is to measure the concentrations of metals and metalloids that are in true solution in a sample that has been appropriately acidified. Therefore, material that does not pass through a filter with smaller holes, such as a 0.1 μm membrane filter, should not be considered acid-soluble even if it passes through a 0.45 μm membrane filter. Optional filtration of appropriately filtered water samples should be considered whenever the concentration of aluminum that passes through a 0.45 μm membrane filter in an acidifed water sample exceeds a limit specified in terms of acid-soluble aluminum.

Metals and metalloids might be measured using the total recoverable method. This would have two major impacts because this method includes a digestion procedure. First, certain species of some metals and metalloids cannot be measured because the total recoverable method cannot distinguish between individual oxidation states. Second, in some cases these criteria would be overly protective when based on the total recoverable method because the digestion procedure will dissolve aluminum that is not toxic and cannot be converted to a toxic form under natural conditions. This could be a major problem in ambient waters that contain suspended clay. Because no measurement is known to be ideal for expressing aquatic life criteria for aluminum or for measuring aluminum in ambient water or aqueous effluents, measurement of both acid-soluble aluminum and total recoverable aluminum in ambient water or effluent or both might be useful. For example, there might be cause for concern if total recoverable aluminum is much above an applicable limit, even though acid soluble aluminum is below the limit.

In addition, metals and metalloids might be measured using the dissolved method, but this would also have several impacts. First, in many toxicity tests on aluminum the test organisms were exposed to both dissolved and undissolved aluminum. If only the dissolved aluminum had been measured, the acute and chronic values would be lower than if acid-soluble or total recoverable aluminum had been measured. Therefore, water quality criteria expressed as dissolved aluminum would be lower than criteria expressed as acid-soluble or total recoverable aluminum. Second, not enough data are available concerning the toxicity of dissolved aluminum to allow derivation of a criterion based on dissolved aluminum. Third, whatever analytical method is specified for measuring aluminum in ambient surface water will probably also be used to monitor effluents. If effluents are monitored by measuring only the dissolved metals and metalloids, carbonate and hydroxide precipitates of metals would not be measured. Such precipitates might dissolve due to dilution or change in pH or both when the effluent is mixed with receiving water. Fourth, measurement of dissolved aluminum requires filtration of the sample at the time of collection. For these reasons, it is recommended that aquatic life criteria for aluminum not be expressed as dissolved aluminum.

As discussed in the Water Quality Standards Regulation and the Foreword to this document, a water quality criterion for aquatic life has regulatory impact if it has been adopted in a State water quality standard. Such a standard specifies a criterion for a pollutant that is consistent with a particular designated use. With the concurrence of the U.S. EPA, States designate one or more uses for each body of water or segment thereof and adopt criteria that are consistent with the use(s). In each standard a State may adopt the national criterion, if one exists, or, if adequately justified, a site specific criterion.

Site-specific criteria may include not only site-specific criterion concentrations but also site-specific, and possibly pollutant-specific, durations of averaging periods and frequencies of allowed excursions. The averaging periods of "one hour" and "four days" were selected by the U.S. EPA on the basis of data concerning how rapidly some aquatic species react to increases in the concentrations of some pollutants, and "three years" is the Agency's best scientific judgment of the average amount of time aquatic ecosystems should be provided between excursions. However, various species and ecosystems react and recover at greatly differing rates. Therefore, if adequate justification is provided, site-specific and/or pollutant specific concentrations, durations, and frequencies may be higher or lower than those given in national water quality criteria for aquatic life.

Use of criteria, which have been adopted in State water quality standards, for developing water quality based permit limits and for designing wastewater treatment facilities requires selection of an appropriate wasteload allocation model. Although dynamic models are preferred for the application of these criteria, limited data or other considerations might require the use of a steady state model. Guidance on mixing zones and the design of monitoring programs is also available.

[FR Doc. 88-19633 Filed 8-29-88; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Requirement Approval by Office of Management and Budget

August 24, 1988.

The following information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507). For further information contact Doris Benz, Federal Communications Commission, telephone (202) 632-7513.

OMB No.: 3060-0025

Title: Application for Restricted Radiotelephone Operator Permit—Limited Use

Form No.: FCC 755

A revised application form has been approved through 7/31/91.

The October 1985 edition with a previous expiration date of 7/31/88 will remain in use until revised forms are available.

Federal Communications Commission.

H. Walker Feaster III,

Acting Secretary.

[FR Doc. 88-19607 Filed 8-29-88; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-002605-004.

Title: Port of Oakland Terminal Agreement.

Parties: Port of Oakland, American President Lines, Ltd. (APL).

Synopsis: The agreement amends the basic agreement to provide for the filing with the Commission of further amendments if APL exercises any option to renew the term of the agreement provided in Agreement No. 224-002605-003.

Agreement No.: 224-002758-007.

Title: Port of Oakland Terminal Agreement.

Parties: Port of Oakland, American President Lines, Ltd. (APL).

Synopsis: The agreement amends the basic agreement to provide for the filing with the Commission of further amendments if APL exercises any option to renew the term of the agreement provided in Agreement No. 224-002758-006.

Agreement No.: 224-002758C-003.

Title: Port of Oakland Terminal Agreement.

Parties: Port of Oakland, American President Lines, Ltd. (APL).

Synopsis: The agreement amends the basic agreement to provide for the filing with the Commission of further amendments if APL exercises any option to renew the term of the agreement provided in Agreement No. 224-002758C-002.

Agreement No.: 224-200148.

Title: Virgin Islands Port Authority Lease Agreement.

Parties: Virgin Islands Port Authority (Port), Tropical Shipping and Construction Co., Ltd.

Synopsis: The agreement revises and consolidates the various rental agreements presently existing between the Port and Tropical with respect to a certain parcel of land and warehouse located in Third Port Facility, St. Croix, Virgin Islands into a single lease agreement with provisions to extend the duration of the terms of the consolidated holdings.

By Order of the Federal Maritime Commission.

Dated: August 25, 1988.

Joseph C. Polking,

Secretary.

[FR Doc. 88-19656 Filed 8-29-88; 8:45 am]

BILLING CODE 6730-01-M

Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 16 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 202-008868-020

Title: Inter-American Freight Conference Puerto Rico and U.S. Virgin Islands Area

Parties: A. Bottacchi S.A. de Navegacion C.F.I. e I. A/S Ivarans Rederi, Companhia Martima Nacional, Companhia de Navegacao Lloyd Brasileiro, Empresa Lineas Maritimas Argentinas Sociedad Anonima (Elma S/A), Empresa de Navegacao Alianca S.A., Frota Amazonica S.A., Paxicon Line, Suriname Line, Transportacion Maritima Mexicana S.A.

Synopsis: The proposed modification would conform the agreement to the Commission's requirements concerning Docket No. 86-16, service contract provisions.

Agreement No.: 202-010776-034

Title: Asia North America Eastbound Rate Agreement

Parties: American President Lines, Ltd., Kawasaki Kisen Kaisha, Ltd., A.P. Moller-Maersk Line, Mitsui O.S.K. Lines, Ltd., Japan Line, Ltd., Neptune Orient Lines, Ltd., Nippon Yusen Kaisha Line, Orient Overseas Container Lines, Inc., Sea-Land Service, Inc., Yamashita-Shinnihon Steamship Co., Ltd.

Synopsis: The proposed modification would further clarify the provisions applicable to service contracts.

Agreement No.: 212-010286-015

Title: South Europe/U.S.A. Pool Agreement

Parties: Compania Trasatlantica Espanola, S.A., Costa Container Lines, S.p.A., Evergreen Marine Corporation, Farell Lines, Inc., "Italia" di Navigazione, S.p.A., Jugolinija, Lykes Lines, A. P. Moller-Maersk Line, Nedlloyd Lines, Sea-Line Service, Inc., P&O Containerss (TFL) Limited, Zim Israel Navigation Company, Ltd.

Synopsis: The proposed modification would authorize the parties to agree upon uniform contribution level(s) for commodities transported by them within the scope of the agreement.

Agreement No.: 203-011164-002

Title: U.S./Middle East Discussion Agreement

Parties: "8900" Lines, Jugolinija Line

Synopsis: The proposed modification would conform the agreement to the Commission's requirements concerning Docket No. 86-16, service contract provisions.

Agreement No.: 203-011171-001

Title: TFL/Nedlloyd/Sea-Land Agreement ("the Agreement")

Parties: P&O Containers (TFL) Limited, Nedlloyd Lijnen, B.V., Sea-Land Service, Inc.

Synopsis: The proposed modification would authorize the parties to discuss and jointly agree upon the chartering of surplus space on vessels operated under the terms of the Agreement to ocean common carriers not signatories to the Agreement. Any agreement reached with an outside party will be filed with the FMC.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

Dated: August 25, 1988.

[FR Doc. 88-19695 Filed 8-29-88; 8:45 am]

BILLING CODE 6730-01-M

[Docket No. 88-20]

Atlantis Line, Ltd. v. Australia New Zealand Direct Line; Filing of Complaint and Assignment

Notice is given that a complaint filed by Atlantis Line, Ltd. ("Atlantis") against Australia New Zealand Direct Line (a joint service of Australia New Zealand Container Line and Pacific Australia Direct Line) ("ANZL") was served August 25, 1988. Atlantis alleges that ANZL has published or participated in two tariffs applicable to the same shipments in the westbound U.S./Australia-New Zealand trade and thereby engaged in unfair and discriminatory practices and given unfair preferences to shippers other than Atlantis, all in violation of section 10 of the Shipping Act of 1984, 46 U.S.C. app. 1709.

This proceeding has been assigned to Administrative Law Judge Joseph N. Ingolia ("Presiding Officer"). Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61. The hearing shall include oral testimony and cross-examination in the discretion of the Presiding Officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. Pursuant to the further terms of 46 CFR 502.61, the initial decision of the Presiding Officer in this proceeding shall be issued by August 25, 1989, and the final decision of the Commission shall be issued by December 25, 1989.

Joseph C. Polking,

Secretary.

[FR Doc. 88-19696 Filed 8-29-88; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register.**

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period:

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 080888 AND 081988

Name of Acquiring Person, Name of Acquired Person, Name of Acquired Entity,	PMN Number	Date Terminated
The Clayton & Dubilier Private Equity Fund II Ltd Ptnsh, United Certrifugal Pumps, United Certrifugal Pumps	88-2068	08/08/88
Jeffrey H. Smulyan, General Electric Company, five subsidiaries	88-2118	08/08/88
Agway Inc., Robert A. Fischer, Sr., Milford Fertilizer Company	88-2145	08/08/88
Nippon Yusen Kaisha, Ltd., O.P. Adney, Jr., GST Corporation	88-2169	08/08/88
Nippon Yusen Kabushiki Kaisha, W.A. Jones, GST Corporation	88-2170	08/08/88
Theodore F. Perlman, Sysco Corporation, The HAVI Corporation	88-2204	08/08/88
Inter-Regional Financial Group, Inc., Milwaukee Financial Group, Inc., Milwaukee Financial Group, Inc.	88-2231	08/08/88
Raymond G. Perelman, General Refractories Company, General Refractories Company	88-2193	08/09/88
ML Media Partners, L.P., Jay J. O'Neal, Universal Cable Holdings, Inc	88-2200	08/09/88
Sandoz Ltd., HSP, Inc., HSP, Inc	88-1999	08/10/88
George M. Phillips, The Philp Co. Trust, The Southland Corporation	88-2112	08/10/88
Armstrong World Industries, Inc., The Bydand Corporation, Gordon's, Inc	88-2133	08/10/88
Ford Motor Company, Mariani Financial Co., a California Limited Partnership, MFCO Associates, a California General Partnership	88-2134	08/10/88
Tele-Communications Inc., Cablevision Associates VI, L.P., Cablevision Associates VI, L.P	88-2153	08/10/88
Tele-Communications, Inc., Northeastern Cable Limited Partnership, Taft Cable Partners	88-2158	08/10/88
Anacomp, Inc., Xidex Corporation, Xidex Corporation	88-2165	08/10/88
Tele-Communications, Inc., Cablevision Associates VII, a Limited Partnership, Cablevision Associates VII, a Limited Partnership	88-2221	08/10/88
Pechiney, Tempcraft, Inc., Tempcraft, Inc	88-2226	08/10/88
Alan Bond, The Bell Group Ltd., The Bell Group Ltd	88-2237	08/10/88
Dofasco Inc., Canadian Pacific Limited, The Algoma Steel Corporation, Limited	88-2127	08/11/88
Shiseido Co. Ltd., Leandro P. Rizzuto, Zotos International, Inc	88-2182	08/11/88
Health Care Property Investors, Inc., Beverly Enterprises, Inc., Beverly Enterprises, Inc	88-2195	08/11/88
Castle & Cooke, Inc., MEI Diversified Inc., Bonner Packing Company	88-2113	08/12/88
James M. Fail, Integrated Resources, Inc., Integrated Resources, Inc	88-2152	08/12/88
Martion Marietta Corporation, Gould Inc., Ocean Systems Divi of Gi—Glen Burnie, MD operations	88-2161	08/12/88
Contel Corporatin, Eaton Corporation, Data Systems Services Div. and Info. Mngmt Systems Divi	88-2183	08/12/88
American General Corporation, Pinnacle West Capital Corporation, Pinnacle West Capital Corporation	88-2184	08/12/88
Societe Nationale Elf Aquitaine, Roy M. Huffington, Huffington Petroleum Corporation	88-2199	08/12/88
H.H. Robertson Company, Star Acquisition Company, Star Acquisition Company	88-2220	08/12/88
Roadmaster Industries, Inc., Fuqua Industries Inc., Ajay Enterprises Corporation	88-2235	08/12/88
Tele-Communications, Inc., Melia International N.V., Commonwealth Theatres, Inc	88-2246	08/12/88
NYNEX Corporation, U.S. West, Inc., U.S. West, Inc	88-2252	08/12/88
Saratoga Partners II, L.P., AMAX, Inc., Amax Zinc Company, Inc	88-2253	08/12/88
The Morgan Stanley Leveraged Equity Fund II, L.P., Cullum Companies, Inc., Cullum Companies, Inc	88-2263	08/12/88
Union Planters Corporation, UMIC Securities Corporation, UMIC Securities Corporation	88-2270	08/12/88
Nomura Securities Co., Ltd., Wasserstein, Perella & Co. Holdings, Inc., Wasserstein, Perella Group, Inc.	88-2286	08/12/88
Philip F. Anschutz, Santa Fe Southern Pacific Corporation, Southern Pacific Transportation Company	88-2291	08/12/88
Roy E. Disney and Patricia A. Disney, husband & wife, Polaroid Corporation, Polaroid Corporation	88-2168	08/15/88
Dainippon Ink and Chemicals, Incorporated, Technical Tape, Inc., Technical Tape, Inc	88-2219	08/15/88
Drexel Burnham Lambert Incorporated, Tate & Lyle, Staley Commodities International, Inc	88-2306	08/15/88

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 080888 AND 081988—Continued

Name of Acquiring Person, Name of Acquired Person, Name of Acquired Entity,	PMN Number	Date Terminated
Ely S. Jacobs, Beta Partners, Tripac Holding Corp. and Triangle Pacific Corp	88-2180	08/16/88
Standard Federal Savings Bank, Ford Motor Company, First Family Mortgage Corporation	88-2212	08/16/88
Donald J. Trump, The Pillsbury Company, The Pillsbury Company	88-2227	08/16/88
Mark IV Industries, Inc., Armtek Corporation, Armtek Corporation	88-2254	08/16/88
Precision Aerotech, Inc., Bowater Industries plc, R-9 Holdings, Inc	88-2281	08/16/88
The BOC Group plc, Spectramed, Inc., Spectramed, Inc	88-2292	08/16/88
Koninklijke Wessanen N.V., John F. Weeks, Jr., Weeks Dairy Foods, Inc	88-2135	08/17/88
Silicon Valley Group, Inc., Allegheny International, Inc., Thermco Systems, Inc	88-2186	08/17/88
Household International, Inc., Great American First Savings Bank, Certain assets of GAF	88-2275	08/17/88
Parfums Nina Ricci S.A., Societe Nationale Elf Aquitaine, Parfums Nina Ricci U.S.A. Inc	88-2214	08/18/88
Dillard Paper Company, Mr. Donald G. Shields, The Mudge Paper Company	88-2215	08/18/88
Pennant Properties PLC, Bay Financial Corporation, Bay Financial Corporation	88-2233	08/18/88
Saratoga Partners II, L.P., Rolf Ostern, Viking Office Products, Inc	88-2248	08/18/88
J.B. Poindexter, Chemtech Industries, Inc., Chemtech Industries, Inc	88-2277	08/18/88
First Boston, Inc., Insilco Corporation, Insilco Corporation	88-2337	08/18/88
First Boston, Inc., Insilco Corporation, Insilco Corporation	88-2347	08/18/88
M. Lee Pearce, M.D., American Medical International, Inc., American Medical International, Inc	88-2192	08/19/88
Ralph J. Roberts, Tele-Communications, Inc., Heritage Communications, Inc	88-2205	08/19/88
Marks and Spencer p.l.c., Allen I. Bildner, King Super Markets, Inc	88-2243	08/19/88
Itel Corporation, Leaseway Transportation Corp., Leaseway Transportation Corp	88-2295	08/19/88
Westinghouse Electric Corporation, Westinghouse Electric Corporation, Aptus Partnership	88-2316	08/19/88
Hellman & Friedman Capital Partners, American President Companies, Inc., American President Companies, Inc	88-2323	08/19/88
Westinghouse Electric Corporation, T.L. Meehan, Aptus Partnership	88-2328	08/19/88
Westinghouse Electric Corporation, W.H. Hawks, Aptus Partnership	88-2329	08/19/88
First Boston, Inc., ISC Holdings Inc., ISC Holdings Inc	88-2336	08/19/88
Metropolitan Life Insurance Company, ISC Holdings Inc., ISC Holdings Inc	88-2348	08/19/88

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, Contact Representative, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580, (202) 326-3100.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 88-19617 Filed 8-29-88; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Alcohol, Drug Abuse, and Mental Health Administration

Advisory Committees; Meeting; Correction

AGENCY: Alcohol, Drug Abuse, and Mental Health Administration.

ACTION: Correction notice.

SUMMARY: Public notice was given in the **Federal Register** on August 18, 1988, Volume 53, No. 160, on page 31396, that the Mental Health Acquired Immunodeficiency Syndrome Research Review Committee, NIMH, would meet at the Days Inn. The notice is being corrected to read as follows:

The Mental Health Acquired Immunodeficiency Syndrome Research Review Committee, NIMH, will meet at the Holiday Inn-Crowne Plaza, 1750 Rockville Pike, Rockville, Maryland 20852

All other information for this committee remains the same.

Date: August 25, 1988.

Peggy W. Cockrill,

Committee Management Officer, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 88-19680 Filed 8-29-88; 8:45 am]

BILLING CODE 4160-20-M

Food and Drug Administration

[Docket No. 88N-0272]

Criteria for Determining the Regulatory Status of Foods and Food Ingredients Produced by New Technologies; Announcement of Study; Request for Scientific Data and Information

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the Federation of American Societies for Experimental Biology (FASEB), Life Sciences Research Office, is about to begin a study of which scientific concepts and considerations are most appropriately used to determine the regulatory status of foods and food ingredients that are produced by new technologies. FASEB is inviting submission of scientific data and information bearing on this topic. FASEB will provide the opportunity for public comment at an open meeting. FDA will announce in the **Federal Register** the date, time, and place of the meeting.

DATE: Scientific data and information to be submitted by September 30, 1988.

ADDRESSES: Scientific data and information should be submitted to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, and the Life Sciences Research Office, Federation of American Societies for Experimental Biology, 9650 Rockville Pike, Bethesda, MD 20814. Two copies of the scientific data and information should be submitted to each office.

FOR FURTHER INFORMATION CONTACT:

Kenneth D. Fisher, Life Sciences Research Office, Federation of American Societies for Experimental Biology, 9650 Rockville Pike, Bethesda, MD 20814, 301-530-7030, or

James H. Maryanski, Center for Food Safety and Applied Nutrition (HFF-

300), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-426-8950.

SUPPLEMENTARY INFORMATION: FDA has a contract (223-88-2124) with FASEB concerning the analysis of scientific issues that bear on the safety of foods and cosmetics. The objective of this contract is to provide information to FDA on general and specific issues of scientific fact associated with the safety of foods and cosmetics. FDA intends to develop a set of criteria that will permit the agency to determine the regulatory status and the safety of foods and food ingredients produced by new technologies. FDA is announcing that it has asked FASEB, as a task under the contract, to determine the scientific community's views on the safety of foods and food ingredients produced by new technologies. In response, FASEB asked its Life Sciences Research Office to appoint an ad hoc panel to study this matter. The ad hoc panel will report its findings to FASEB through its Life Sciences Research Office. FASEB will then evaluate these findings and submit its own report to FDA.

Many new or modified foods and food ingredients are being developed through new technologies such as recombinant DNA techiques. The degree of novelty associated with foods and food ingredients developed through these technologies will vary widely.

FDA believes that it would help expedite its evaluation of these new products, and would focus agency resources, if the factors that are most appropriate for evaluating the regulatory status and the safety of the new and modified foods and food ingredients were identified and agreed upon by the scientific community.

The agency considers a range of factors in evaluating the status of a product. Some of these factors include whether:

(1) The food ingredients is a reaction product of, or is manufactured from, generally recognized as safe (GRAS) food ingredients, regulated food additives, or substances otherwise considered to be safe (e.g., amino acids).

(2) The food ingredient is chemically similar to an ingredient whose use in food is GRAS but is not identical to that ingredient in all respects.

(3) The food ingredient contains impurities that must be controlled by a specification.

(4) The level of use of the food ingredient requires limitation based on existing safety information.

(5) Only limited published data or information exists to support the safety of the intended use of the food ingredient (e.g., patents, research papers, summary monographs, safety studies).

(6) The food ingredient has a history of use in food in some parts of the world, but the proposed uses are new to the United States.

(7) The food ingredient is derived from a source (e.g., plant or microorganism) that has been used safely in other contexts.

(8) The food ingredient is manufactured by a process that a manufacturer considers to be confidential (specific strains or traits, alternative methods, processing ingredients).

(9) The food ingredient has been genetically modified by a process considered to be confidential.

(10) The food ingredient has been "approved" by an international, national, or other recognized organization outside the United States as safe for use in foods but has not been evaluated by FDA.

(11) The food ingredient (e.g., tomato, potato, corn, wheat, rice, soybean, meat) has been genetically modified to enhance disease or weather resistance, improve nutritional quality, increase yield, or for any other reason.

FDA is interested in an evaluation of the relevance and significance of these and other factors to determine the regulatory status and safety of foods and food ingredients produced by the use of new technologies.

In accordance with 21 CFR 14.15(b)(1), notice is given that the ad hoc panel appointed by FASEB will hold an open meeting in the future, during which an opportunity will be provided for the public to present written and oral views, scientific data, and information on the issues listed above and on similar issues concerning foods and food ingredients produced by new technologies. The exact date, time, and location of the meeting will be announced in the **Federal Register** at a later date.

This notice invites submission of information on scientific concepts and considerations that can be used to devise criteria to determine the appropriate regulatory status and safety of foods and food ingredients produced by new technologies. Two copies of any scientific data and information should be submitted to both FDA's Dockets Management Branch and the Life Sciences Research Office of FASEB (addresses above). The deadline for receipt of such information is September 30, 1988. Pursuant to its contract with FDA, FASEB will provide the agency with a scientific report on these and other issues concerning foods and food ingredients produced by new technologies.

Dated: August 25, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-19683 Filed 8-29-88; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 88D-0017]

Conditions Under Which Homeopathic Drugs May Be Marketed; Availability of Compliance Policy Guide; Correction

AGENCY: Food and Drug Administration.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting the notice that announced the availability of Compliance Policy Guide 7132.15 entitled "Conditions Under Which Homeopathic Drugs May Be Marketed"—May 31, 1988 (53 FR 21728; June 9, 1988). In 2 places under the heading **"SUPPLEMENTARY INFORMATION"** the number of the Compliance Policy Guide was incorrectly stated as 7132.5 instead of 7132.15. This document corrects these errors to eliminate any ambiguity in ordering the Compliance Policy Guide.

FOR FURTHER INFORMATION CONTACT: T. Rada Proehl, Regulations Editorial Staff (HFC-222), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-2994.

SUPPLEMENTARY INFORMATION: In FR Doc. 88-12949, appearing at page 21728 in the **Federal Register** of Thursday, June 9, 1988, the following corrections are made:

Under the heading **"SUPPLEMENTARY INFORMATION,"** first column, second paragraph, line 1, and in the second column, line 1, "Compliance Policy Guide 7132.5" is corrected to read "Compliance Policy Guide 7132.15".

Dated: August 24, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-19684 Filed 8-29-88; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 88D-0243]

Draft Guidance Document for Class III Contact Lenses; Availability

AGENCY: Food and Drug Administration.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the

availability of a draft "Guidance Document for Class III Contact Lenses," prepared by FDA's Center for Devices and Radiological Health (CDRH). The document provides guidance to the contact lens industry for evaluating the safety and effectiveness of class III contact lenses. The guidance document is being made available for public comment to provide CDRH's Division of Ophthalmic Devices with views to be considered in its development of a final guidance document for class III contact lenses.

DATE: Comments may be submitted at any time; however, comments submitted by October 31, 1988 will be considered during preparation of a final guidance document.

ADDRESS: The "Guidance Document for Class III Contact Lenses" is available for public examination at, and written comments may be submitted to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857. Address written requests for single copies of the guidance document to the Division of Small Manufacturers Assistance, Center for Devices and Radiological Health (NFZ-220), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 800-638-2041, calls from within MD 301-443-6597.

FOR FURTHER INFORMATION CONTACT: David M. Whipple, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7940.

SUPPLEMENTARY INFORMATION: The draft "Guidance Document for Class III Contact Lenses" is intended to provide the agency's suggested guidance to enable manufacturer of a contract lens to conduct an adquate battery of preclinical tests to ensure that patients are not placed at undue risk in a clinical trial, and to enable a manufacturer to conduct a clinical trial that will adequately demonstrate whether the lens is safe and effective for its intended use.

The draft guidance document is being made available for public comment before being issued in final form. If, following the receipt of comments, the agency concludes that the guidance document reflects acceptable practices and procedures for the preparation and submission of investigational device exemption applications and premarket approval applications for class III contact lenses, the draft guidance document will be made final, and its availability will be announced in the **Federal Register**.

FDA is making the draft guidance document available under 21 CFR 10.90(b). That section provides for use of guidelines to establish procedures of general applicability that are not legal requiements but are acceptable to the agency. A person may also choose to use alternative procedures even though they are not provided for in the guidance document. A person who chooses to do so may discuss the matter further with the agency to prevent expenditure of money and effort on an alternative procedure that the agency may later determine to be unacceptable. Manufacturers are encouraged to use this opportunity to submit comments on the draft guidance document, if they have suggestions for its revision.

Interested persons may submit comments on the draft guidance document at any time. However, comments submitted by October 31, 1988 will be considered during preparation of a final guidance document. Two copies of any comments are to be submitted, except that individuals may submit single copies. Comments should be identified with the document number found in brackets in the heading of this document. The draft guidance document and received comments may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 24, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-19685 Filed 8-29-88; 8:45 am]

BILLING CODE 4160-01-M

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Meeting of Microbiology and Infectious Diseases Research Committee

Pursuant to Pub. L. 92-463, notice is hereby given of the meeting of the Microbiology and Infectious Diseases Research Committee, National Institute of Allergy and Infectious Diseases, on October 13 and 14, 1988, in Building 31C, Conference Room 8, at the National Institutes of Health, Bethesda, Maryland 20892.

The meeting will be open to the public from 8:30 a.m. to 11:15 a.m. on October 13, to discuss administrative details relating to committee business and for program review. Attendance by the public will be limited to space available. In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. and section 10(d) of Pub. L. 92-463, the meeting of the Microbiology and Infectious Diseases Research Committee will be closed to the public for the review, discussion, and evaluation of individual grant applications and contract proposals from 11:15 a.m. until recess on October 13, and from 8:30 a.m. until adjournment on October 14. These applications, proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Patricia Randall, Office of Research Reporting and Public Response, National Institute of Allergy and Infectious Diseases, Building 31, Room 7A32, National Institutes of Health, Bethesda, Maryland 20892, telephone (301-496-5717), will provide a summary of the meeting and a roster of the committee members upon request.

Dr. M. Sayeed Quraishi, Executive Secretary, Microbiology and Infectious Diseases Research Committee, NIAID, NIH, Westwood Building, Room 706, Bethesda, Maryland 20892, telephone (301-496-7465), will provide substantive program information.

(Catalog of Federal Domestic Assistance Program Nos. 13.855, Pharmacological Sciences; 13.856, Microbiology and Infectious Diseases Research, National Institutes of Health.)

Dated: August 19, 1988.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 88-19584 Filed 8-29-88; 8:45 am]

BILLING CODE 4140-01-M

National Institute of Diabetes and Digestive and Kidney Diseases; Meeting of the National Diabetes and Digestive and Kidney Diseases Advisory Council and Its Subcommittees

Pursuant to Pub. L. 92-463, notice is hereby given of a meeting of the National Diabetes and Digestive and Kidney Diseases Advisory Council and its subcommittees, National Institute of Diabetes and Digestive and Kidney Diseases, on September 26 and 27, 1988, Wilson Hall, Building 1, National Institutes of Health, Bethesda, Maryland. The meeting will be open to the public September 26 from 8:30 a.m. to 12 noon and again on September 27 from 1 p.m. to adjournment to discuss administrative details relating to

Council business and special reports. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. and sec. 10(d) of Pub. L. 92-463, the subcommittees and full Council meeting will be closed to the public for the review, discussion and evaluation of individual grant applications. The following subcommittees will be closed to the public on September 26 from 1 p.m. to recess: Diabetes, Endocrine and Metabolic Diseases; Digestive Diseases and Nutrition; and Kidney, Urologic and Hematologic Diseases. The full Council meeting will be closed on September 27 from 8:30 a.m. to approximately 12 noon.

These deliberations could reveal confidential trade secrets or commercial property, such as patentable materials, and personal information concerning individuals associated with the applications, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Further information concerning the Council meeting may be obtained from Dr. Walter Stolz, Executive Secretary, National Diabetes and Digestive and Kidney Diseases Advisory Council, NIDDK, Westwood Building, Room 675, Bethesda, Maryland 20892. (301) 496-7277.

A summary of the meeting and roster of the members may be obtained from the Committee Management Office, NIDDK, Building 31 Room 9A19, National Institutes of Health, Bethesda, Maryland 20892, (301) 496-6917.

(Catalog of Federal Domestic Assistance Program No. 13.847-849, Diabetes, Endocrine and Metabolic Diseases; Digestive Diseases and Nutrition; and Kidney Diseases, Urology amd Hematology Research, National Institutes of Health)

Dated: August 19, 1988.

Betty J. Beveridge,

NIH, Committee Management Officer.

[FR Doc. 88-19585 Filed 8-29-88; 8:45 am]

BILLING CODE 4140-01-M

National Library of Medicine; Meetings of the Board of Regents and Subcommittees

Pursuant to Pub. L. 92-463, notice is hereby given of the meeting of the Board of Regents of the National Library of Medicine on October 6-7, 1988, in the Board Room of the National Library of Medicine, 8600 Rockville Pike, Bethesda, Maryland. The Subcommittees will meet on October 5 as follows:

The Extramural Programs Subcommittee, 5th-floor Conference Room, and the Lister Hill Center Subcommittee, 7th-floor Conference Room, in the Lister Hill Center Building, 2 to 4 p.m. The Program Outreach Subcommittee, Conference Room A, Mezzanine, National Library of Medicine, from 4 to 5 p.m.

The meeting of the Board will be open to the public from 9 a.m. to approximately 5 p.m. on October 6 and from 9 to approximately 10:30 a.m. on October 7 for administrative reports and program discussions. The entire meeting of the Program Outreach Subcommittee and the meeting of the Lister Hill Center Subcommittee will be open to the public. Attendance by the public will be limited to space available.

In accordance with provisions set forth in sections 552b(c)(4), 552b(c)(6), Title 5, U.S.C. and section 10(d) of Pub. L. 92-463, the entire meeting of the Extramural Programs Subcommittee on October 5 will be closed to the public, and the regular Board meeting on October 7 will be closed from approximately 10:30 a.m. to adjournment for the review, discussion, and evaulation of individual grant applications. These applications and the discussion could reveal confidential trade secrets or commercial property, such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Mr. Robert B. Mehnert, Chief, Office of Inquiries and Publications Management, National Library of Medicine, 8600 Rockville Pike, Bethesda, Maryland 20894, Telephone Number: 301-496-6308, will furnish a summary of the meeting, rosters of Board members, and other information pertaining to the meeting.

(Catalog of Federal Domestic Assistance Program No. 13.879—Medical Library Assistance, National Institutes of Health.)

Dated: August 19, 1988.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 88-19586 Filed 8-29-88; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-020-8-4212-13; AZA-22880, AZA-23360]

Public Land Exchanges; Mohave and Yavapai Counties, AZ; Correction

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction notice.

SUMMARY: This notice provides a correction of the segregative effect of two notices of realty action published for land exchanges AZA-22880 and AZA-23360 which erroneously failed to include references to the mining and mineral leasing laws.

FOR FURTHER INFORMATION CONTACT: Mike Berch, Kingman Resource Area, (602) 757-3161.

SUPPLEMENTARY INFORMATION: In **Federal Register** document 88-14747 on page 24804 in the issue of Thursday, June 30, 1988, and **Federal Register** document 88-14224 on page 23696 in the issue of Thursday, June 23, 1988, the first sentence of the next to last paragraph of both documents should read, "Publication of this Notice will segregate the subject lands from operation of the public land laws *and the mining and mineral leasing laws.*".

Henri R. Bisson,

District Manager.

Date: August 19, 1988.

[FR Doc. 88-19587 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-32-M

[CO-942-08-4520-12]

Colorado: Filing of Plats of Survey

August 16, 1988.

The plats of survey of the following described land, will be officially filed in the Colorado State Office, Bureau of Land Management, Lakewood, Colorado, effective 10:00 a.m., August 18, 1988.

The plat (in five sheets) representing the dependent resurvey of portions of the south, west, and north boundaries, a portion of the subdivisional lines, a portion of the subdivision of section 9, and certain mineral surveys, and the survey of the subdivision of certain sections, T. 46 N., R. 2 W., New Mexico Principal Meridian, Colorado, Group No. 785, was accepted July 29, 1988.

The plat representing the dependent resurvey of portions of the east boundary and the subdivisional lines, and a portion of the metes-and-bounds survey of certain claim lines and the survey of the subdivision of certain sections, T. 1 N., R. 103 W., Sixth Principal Meridian, Colorado, Group No. 821, was accepted August 1, 1988.

The plat representing the dependent resurvey of portions of the south and east boundaries, the subdivisional lines, and a portion of the metes-and-bounds survey of certain claim lines and the survey of the subdivision of sections 35 and 36, T. 2 N., R. 102 W., Sixth Principal

Meridian, Colorado, Group No. 821, was accepted August 1, 1988.

The plat representing the dependent resurvey of portions of the east and north boundaries, the subdivisional lines, a portion of the metes-and-bounds survey of certain claim lines, and a portion of the subdivision lines of section 1, and the survey of the subdivision of certain sections, T. 1 N., R. 102 W., Sixth Principal Meridian, Colorado, Group No. 821, was accepted August 1, 1988.

These surveys were executed to meet certain administrative needs of this Bureau.

All inquiries about this land should be sent to the Colorado State Office, Bureau of Land Management, 2850 Youngfield Street, Lakewood, Colorado, 80215.

Jack A. Eaves,

Chief, Cadastral Surveyor for Colorado.

[FR Doc. 88–19595 Filed 8–29–88; 8:45 am]

BILLING CODE 4310–JB–M

[NM–940–08–4220–11; NM NM 69214]

Proposed Continuation of Withdrawal; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture, Forest Service, proposes that a 37.13-acre withdrawal of National Forest System land for use in connection with Cabresto Lake Campground and Fishing Area (formerly Lake Cabresto Campground) continue for an additional 20 years. The land will remain closed to mining and will be opened to surface entry. The land has been and remains open to mineral leasing.

DATE: Comments should be received by November 28, 1988.

ADDRESS: Comments should be sent to: New Mexico State Director, BLM, P.O. Box 1449, Santa Fe, NM 87504–1449.

FOR FURTHER INFORMATION CONTACT: Clarence Hougland, BLM, New Mexico State Office, 505–988–6554.

The Forest Service proposes that the existing land withdrawal made by the Secretarial Order dated January 7, 1908, be continued for a period of 20 years pursuant to section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751, 43 U.S.C. 1714. The land is described as follows:

New Mexico Principal Meridian

Carson National Forest

T. 29 N., 13 E.,
  Sec. 13, NE¼SE¼, excluding approximately 2.87 acres lying within the Latir Peak Wilderness Area (Pub. L. 96–550).

The area described contains 37.13 acres in Taos County.

The purpose of the withdrawal is for use in connection with a developed campground in the Carson National Forest, Questa Ranger District. The area has been developed for recreational use and is heavily utilized for this purpose. The withdrawal currently segregates the land from operation of the public land laws generally, including the mining laws, but not the mineral leasing laws. No change is proposed in the purpose or segregative effect of the withdrawal except to open the land to such forms of disposition that may by law be made of National Forest System land other than under the mining laws.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments in connection with the proposed withdrawal continuation may present their views in writing to the New Mexico State Director at the address indicated above.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the land and its resources. A report will be prepared for consideration by the Secretary of the Interior, the President, and Congress, who will determine whether or not the withdrawal will be continued, and if so, for how long. The final determination on the continuation of the withdrawal will be published in the **Federal Register**. The existing withdrawal will continue until such final determination is made.

Monte G. Jordan,

Associate State Director.

Dated: August 16, 1988.

[FR Doc. 88–19586 Filed 8–29–88; 8:45 am]

BILLING CODE 4310–FB–M

National Park Service

Intention to Negotiate Concession Contract; Carr's Grocery and Canoe Rental

Pursuant to the provisions of section 5 of the Act of October 9, 1965, 79 Stat. 969; 16 U.S.C. 20, public notice is hereby given that sixty (60) days after the date of poublication of this notice, the Department of the Interior, through the Director of the National Park Service, proposes to negotiate a concession contract with Carr's Grocery and Canoe Rental authorizing it to continue to provide canoe rental and shuttle services, merchandising sales, firewood sales, and shower and laundry facilities for the public at Ozark National Scenic Riverways, Missouri, for a maximum period of fifteen (15) years from the date of execution of a contract through December 31, 2002.

This contract renewal has been detrmined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under an existing permit which expired by limitation of time on December 31, 1987, and, therefore, pursuant to the Act of October 9, 1965, as cited above, is entitled to be given preference in the renewal of the permit and in the negotiation of a new permit as defined in 36 CFR 51.5.

The Secretary will consider and evaluate all proposals as a result of this notice. Any proposal, including that of the existing concessioner, must be postmarked or hand delivered on or before the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Interested parties should contact the superintendent, Ozark National Scenic Riverways, P.O. Box 490, Van Buren, MO 63965, for information as to the requirements of the proposed contract.

Warren H. Hill,

Acting Regional Director, Midwest Region.

May 12, 1988.

[FR Doc. 88–19686 Filed 8–29–88; 8:45 am]

BILLING CODE 4310–70–M

Concession Contract Negotiations: Magton, Ltd.

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: Public notice is hereby given that the National Park Service proposes to negotiate a concession contract with Magton, Ltd., authorizing it to continue to provide excursion boat transportation and related services for the public at Buck Island Reef National Monument for a period of five (5) years from May 1, 1988, through April 30, 1993.

EFFECTIVE DATE: October 31, 1988.

ADDRESS: Interested parties should contact the Regional Director, Southeast Region, 75 Spring Street, SW., Atlanta, Georgia 30303, for information as to the requirements of the proposed contract.

SUPPLEMENTARY INFORMATION: This contract has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under an existing permit which expired by limitation of time on April 30, 1988, and therefore pursuant to the provisions of section 5 of the Act of October 9, 1965 (79 Stat. 969; 16 U.S.C. 20), is entitled to be given preference in the renewal of the authorization and in the negotiation of a new contract as defined in 36 CFR 51.5.

The Secretary will consider and evaluate all proposals received as a result of this notice. Any proposal, including that of the existing concessioner, must be postmarked or hand delivered on or before the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Date: July 18, 1988.

C. W. Ogle,

Acting Regional Director, Southeast Region.

[FR Doc. 88-19668 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-70-M

Intention To Negotiate Concession Permit; Michiana Industries

Pursuant to the provisions of section 5 of the Act of October 9, 1965, 79 Stat. 969; 16 U.S.C. 20, public notice is hereby given that sixty (60) days after the date of publication of this notice, the Department of the Interior, through the Director of the National Park Service, proposes to negotiate a concession permit with Michiana Industries authorizing it to continue to provide parking lot services for the public at Indiana Dunes National Lakeshore, Indiana, for a period of 5 years from January 1, 1988 through December 31, 1992.

This permit renewal has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under an existing permit which expired by limitation of time on December 31, 1987, and, therefore, pursuant to the Act of October 9, 1965, as cited above, is entitled to be given preference in the renewal of the permit and in the negotiation of a new permit as defined in 36 CFR 51.5.

The Secretary will consider and evaluate all proposals as a result of this notice. Any proposal, including that of the existing concessioner, must be postmarked or hand delivered on or before the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Interested parties should contact the Superintendent, Indiana Dunes National Lakeshore, 1100 Mineral Springs, Porter, Michigan 43604, for information as to the requirements of the proposed permit.

Don H. Castleberry,

Regional Director, Midwest Region.

April 12, 1988.

[FR Doc. 88-19667 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-70-M

Concession Contract Negotiations: Milemark, Inc.,

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: Public notice is hereby given that the National Park Service proposes to negotiate a concession contract with Milemark, Inc., authorizing it to continue to provide excursion boat transportation and related services for the public at Buck Island Reef National Monument for a period of five (5) years from May 1, 1988, through April 30, 1993.

EFFECTIVE DATE: October 31, 1988.

ADDRESS: Interested parties should contact the Regional Director, Southeast Region, 75 Spring Street, SW., Atlanta, Georgia 30303, for information as to the requirements of the proposed contract.

SUPPLEMENTARY INFORMATION: This contract has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under an existing permit which expired by limitation of time on April 30, 1988, and therefore pursuant to the provisions of Section 5 of the Act of October 9, 1965 (79 Stat. 969; 16 U.S.C. 20), is entitled to be given preference in the renewal of the authorization and in the negotiation of a new contract as defined in 36 CFR 51.5.

The Secretary will consider and evaluate all proposals received as a result of this notice. Any proposal, including that of the existing concessioner, must be postmarked or hand delivered on or before the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Date: July 18, 1988.

C.W. Ogle,

Acting Regional Director, Southeast Region.

[FR Doc. 88-19669 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-70-M

Concession Contract Negotiators: Rainy Lake Cruises, Inc.

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: Public notice is hereby given that the National Park Service proposes to negotiate a concession contract with Rainy Lake Cruises, Inc., authorizing it to continue to provide guided water transportation services for the public on Rainy Lake in Voyageurs National Park, Minnesota, for a period of ten (10) years from May 1, 1988, through April 30, 1998.

EFFECTIVE DATE: October 31, 1988.

ADDRESS: Interested parties should contact the Superintendent, Voyageurs National Park P.O. Box 50, International Falls, MN, 56649, for information as to the requirements of the proposed contract.

SUPPLEMENTARY INFORMATION: This contract has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under an existing permit which expired by limitation of time on December 31, 1987, and therefore pursuant to the provisions of Section 5 of the Act of October 9, 1965 (79 Stat. 969; 16 U.S.C. 20), is entitled to be given preference in the negotiation of a new contract as defined in 36 CFR 51.5.

The Secretary will consider and evaluate all proposals received as a result of this notice. Any proposal, including that of the existing concessioner, must be postmarked or hand delivered on or before the sixtieth (60th) day following publication of this notice to be considered and evaluated.

William W. Schenk,

Deputy Regional Director, Midwest Region.

May 18, 1988.

[FR Doc. 88-19670 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-70-M

Concession Contract Negotiations; Signal Mountain Lodge

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: Public notice is hereby given that the National Park Service is canceling its notice published July 27, 1988, to negotiate concessions contracts with Rex G. and Ruth G. Maughan d/b/a Signal Mountain Lodge, authorizing them to continue to provide pack horse service for the public at Grand Teton National Park, Wyoming, and to continue to provide marine services at Leeks Lodge Marina at Grand Teton National Park, Wyoming.

Public notice is hereby given that the National Park Service proposes to extend the concession contracts with Rex and Ruth G. Maughan d/b/a Signal Mountain Lodge and Leeks Lodge Marina, authorizing them to continue to provide lodging accommodations, food services facilities, and automobile services for a period of three (3) years from January 1, 1987, through December 31, 1989; and to continue to provide marina services for a period of one (1) year from October 1, 1988, through September 30, 1989 for the public at Grand Teton National Park, Wyoming.

EFFECTIVE DATE: October 31, 1988.

ADDRESS: Interested parties should contact the Regional Director, Rocky Mountain Region, National Park Service, 12795 West Alameda Parkway, P.O. Box 25287, Lakewood, Colorado 80225, for information as to the requirements of the proposed contracts.

SUPPLEMENTARY INFORMATION: These contracts have been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under existing contracts which expired by limitation of time on December 31, 1988, and therefore pursuant to the provisions of section 5 of the Act of October 9, 1965 (79 Stat. 969; 16 U.S.C. 20), is entitled to be given preference in the renewal of the contracts and in the negotiation of two new contracts as defined in 36 CFR 51.1.

The Secretary will consider and evaluate all proposals received as a result of this notice. Any proposal, including that of the existing concessioner, must be received on or before the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Date: August 10, 1988.

Richard A Strait,

Acting Regional Director, Rocky Mountain Region.

[FR Doc. 88-19672 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-70-M

Concession Contract Negotiators; Southern Seas, Inc.

AGENCY: National Park Service, Interior.

ACTION: Public notice.

SUMMARY: Public notice is hereby given that the National Park Service proposes to negotiate a concession contract with Southern Seas, Inc., authorizing it to continue to provide excursion boat transportation and related services for the public at Buck Island Reef National Monument for a period of five (5) years from May 1, 1988, through April 30, 1993.

EFFECTIVE DATE: October 31, 1988.

ADDRESS: Interested parties should contact the Regional Director, Southeast Region, 75 Spring Street, SW., Atlanta, Georgia 30303, for information as to the requirements of the proposed contract.

SUPPLEMENTARY INFORMATION: This contract has been determined to be categorically excluded from the procedural provisions of the National Environmental Policy Act and no environmental document will be prepared.

The foregoing concessioner has performed its obligations to the satisfaction of the Secretary under an existing permit which expired by limitation of time on April 30, 1988, and therefore pursuant to the provisions of Section 5 of the Act of October 9, 1965 (79 Stat. 969; 16 U.S.C. 20), is entitled to be given preference in the renewal of the authorization and in the negotiation of a new contract as defined in 36 CFR 51.5.

The Secretary will consider and evaluate all proposals received as a result of this notice. Any proposal, including that of the existing concessioner, must be postmarked or hand delivered on or before the sixtieth (60th) day following publication of this notice to be considered and evaluated.

Date: July 18, 1988.

C.W. Ogle,

Acting Regional Director, Southeast Region.

[FR Doc. 88-19671 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-70-M

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before August 20, 1988. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by September 14, 1988.

Beth L. Savage,

Acting Chief of Registration, National Register.

ALABAMA

Etowah County

Legion Park Bowl, 336 1st St., S., Gadsden, 88001581

Tuscaloosa County

First African Baptist Church, 2621 9th St., Tuscaloosa, 88001580

ARIZONA

Apache County

Allentown Bridge, (Vehicular Bridges in Arizona MPS), Indian Rt. 9402 over Puerco River, milepost 9.1, Houck vicinity, 88001617

Petrified Forest Bridge, (Vehicular Bridges in Arizona MPS), Petrified Forest Park Rd. over Rio Puerco, Navajo vicinity, 88001616

Querino Canyon Bridge, (Vehicular Bridges in Arizona MPS), Old US 66 over Querino Canyon, Houck vicinity, 88001623

Sanders Bridge, (Vehicular Bridges in Arizona MPS), Indian Rt. 9402 over the Puerco River, Sanders, 88001618

Cochise County

Canyon Diablo Bridge, (Vehicular Bridges in Arizona MPS), Abandoned grade of US 66 over Diablo Canyon, Winona vicinity, 88001664

Desert Wash Bridge, (Vehicular Bridges in Arizona MPS), Benson Airport Rd. over Desert Wash, Benson, 88001624

Douglas Underpass, (Vehicular Bridges in Arizona MPS), US 80 under Southern Pacific RR, milepost 366.1, Douglas, 88001609

Hereford Bridge, (Vehicular Bridges in Arizona MPS), Hereford Rd. over the San Pedro River, Hereford, 88001659

Coconino County

Canyon Padre Bridge, (Vehicular Bridges in Arizona MPS), Abandoned grade of US 66 over Padre Canyon, Flagstaff vicinity, 88001666

Dead Indian Canyon Bridge, (Vehicular Bridges in Arizona MPS), Abandoned grade of US 64 over Dead Indian Canyon, Desert View vicinity, 88001603

Midgley, W. W., Bridge, (Vehicular Bridges in Arizona MPS), Alt. US 89 over Wilson Canyon, milepost 375.7, Sedona vicinity, 88001614

Pumphouse Wash Bridge, (Vehicular Bridges in Arizona MPS), US 89 over Pumphouse Wash, milepost 387.4, Flagstaff vicinity, 88001605

Walnut Canyon Bridge, (Vehicular Bridges in Arizona MPS), Townsend-Winona Hwy., Winona vicinity, 88001660

Gila County

Black River Bridge, (Vehicular Bridges in Arizona MPS), Indian Rt. 9 over Black River, Carrizo vicinity, 88001619

Cordova Avenue Bridge, (Vehicular Bridges in Arizona MPS), Cordova Ave. over Bloody Tanks Wash, Miami, 88001690

Fossile Creek Bridge, (Vehicular Bridges in Arizona MPS), Forest Service Rd. over Fossil Creek, Stawberry vicinity, 88001620

Inspiration Avenue Bridge, (Vehicular Bridges in Arizona MPS), Inspiration Ave. over Bloody Tanks Wash, Miami, 88001691

Keystone Avenue Bridge, (Vehicular Bridges in Arizona MPS), Keystone Ave. over Bloody Tanks Wash, Miami, 88001692

Miami Avenue Bridge, (Vehicular Bridges in Arizona MPS), Miami Ave. over Bloody Tanks Wash, Miami, 88001693

Reppy Avenue Bridge, (Vehicular Bridges in Arizona MPS), Reppy Ave. over Bloody Tanks Wash, Miami, 88001689

Salt River Bridge, (Vehicular Bridges in Arizona MPS), AZ 288 over Salt River, milepost 262.4, Roosevelt vicinity, 88001604

Salt River Canyon Bridge, (Vehicular Bridges in Arizona MPS), US 60 over Salt River, milepost 292.9, Carrizo vicinity, 88001608

Graham County

Marijilda Canyon Prehistoric Archeological District, Address Restricted, Safford vicinity, 88001572

Solomonville Bridge, (Vehicular Bridges in Arizona MPS), Abandoned Graham Co. rd. over the San Simon River, Safford vicinity, 88001668

Greenlee County

Black Gap Bridge, (Vehicular Bridges in Arizona MPS), 7.8 mi. SW of Clifton on Old Safford Rd., Clifton vicinity, 88001627

Gila River Bridge, (Vehicular Bridges in Arizona MPS), 6.8 mi. SE of Clifton on Old Safford Rd., Clifton vicinity, 88001628

Park Avenue Bridge, (Vehicular Bridges in Arizona MPS), Park Ave. over the San Francisco River, Clifton, 88001661

Solomonville Road Overpass, (Vehicular Bridges in Arizona MPS), 3.6 mi. S of Clifton on Old Safford Rd., Safford vicinity, 88001625

Solomonville Road Overpass, (Vehicular Bridges in Arizona MPS), 4.5 mi. S of Clifton on Old Safford Rd., Clifton vicinity, 88001626

La Paz County

Eagletail Petroglyh Site, Address Restricted, Hyder vicinity, 88001570

Maricopa County

Alchesay Canyon Bridge, (Vehicular Bridges in Arizona MPS), AZ 88 over Alchesay Canyon, milepost 241.1, Roosevelt vicinity, 88001615

Boulder Creek Bridge, (Vehicular Bridges in Arizona MPS), AZ 88 over Boulder Creek, Tortilla Flat vicinity, 88001599

Fish Creek Bridge, (Vehicular Bridges in Arizona MPS), AZ 88, milepost 223.50, Tortilla Flat vicinity, 88001600

Gila Bend Overpass, (Vehicular Bridges in Arizona MPS), Bus. Rt. 8 over Southern Pacific RR, Gila Bend, 88001607

Hassayampa River Bridge, (Vehicular Bridges in Arizona MPS), Old US 80 over the Hassayampa River, Hassayampa, 88001658

Lewis and Pranty Creek Bridge, (Vehicular Bridges in Arizona MPS), AZ 88, milepost 224.60, Tortilla Flat vicinity, 88001601

Mormon Flat Bridge, (Vehicular Bridges in Arizona MPS), AZ 88 over Willow Creek, Tortilla Flat vicinity, 88001598

Pine Creek Bridge, (Vehicular Bridges in Arizona MPS), AZ 88, milepost 233.50, Tortilla Flat vicinity, 88001602

Tempe Bridge, (Vehicular Bridges in Arizona MPS), Abandoned rd. over Salt River, Tempe, 88001606

Mohave County

Bighorn Cave, Address Restricted, Oatman vicinity, 88001571

Old Trails Bridge, (Vehicular Bridges in Arizona MPS), Abandoned US 66 over the Colorado River, Topock, 88001676

Sand Hollow Wash Bridge, (Vehicular Bridges in Arizona MPS), Old US 91 over Sand Hollow Wash, Littlefield vicinity, 88001657

Navajo County

Cedar Canyon Bridge, (Vehicular Bridges in Arizona MPS), US 60 over Cedar Canyon, milepost 323.4, Show Low vicinity, 88001612

Corduroy Creek Bridge, (Vehicular Bridges in Arizona MPS), US 60 over Corduroy Creek, milepost 328.3, Show Low vicinity, 88001613

Holbrook Bridge, (Vehicular Bridges in Arizona MPS), AZ 77 over the Little Colorado River, Holbrook, 88001685

Holbrook Bridge, (Vehicular Bridges in Arizona MPS), Abandoned grade of US 70 over the Little Colorado River, 4.2 mi. SE of Holbrook, Holbrook vicinity, 88001686

Jack's Canyon Bridge, (Vehicular Bridges in Arizona MPS), Abandoned AZ 99 over Jack's Canyon SE of Winslow, Winslow vicinity, 88001678

Lithodendron Wash Bridge, (Vehicular Bridges in Arizona MPS), 13.2 mi. NE of Holbrook on I–40 Frontage Rd., Holbrook vicinity, 88001687

Little Lithodendron Wash Bridge, (Vehicular Bridges in Arizona MPS), 15.8 mi. NE of Holbrook on I–40 Frontage Rd., Holbrook vicinity, 88001688

St. Joseph Bridge, (Vehicular Bridges in Arizona MPS), 4.4 mi. SE of Joseph City on Joseph City-Holbrook Rd., Joseph City vicinity, 88001633

Winslow Underpass, (Vehicular Bridges in Arizona MPS), AZ 87 over Little Colorado River, milepost 344.9, Winslow vicinity, 88001611

Winslow Underpass, (Vehicular Bridges in Arizona MPS), AZ 87 under Atchison, Topeka and Santa Fe RR, milepost 342.1, Winslow, 88001610

Woodruff Bridge, (Vehicular Bridges in Arizona MPS), 4 mi. S of Woodruff on Woodruff-Snowflake Rd., Woodruff vicinity, 88001630

Pima County

Cienega Bridge, (Vehicular Bridges in Arizona MPS), 5.3 mi. SE of Vail on Marsh Station Rd., Vail vicinity, 88001642

Fourth Avenue Underpass, (Vehicular Bridges in Arizona MPS), Fourth Ave., Tucson, 88001654

Sixth Avenue Underpass, (Vehicular Bridges in Arizona MPS), Sixth Ave., Tucson, 88001655

Stone Avenue Underpass, (Vehicular Bridges in Arizona MPS), Stone Ave., Tucson, 88001656

Pinal County

Devil's Canyon Bridge, (Vehicular Bridges in Arizona MPS), Abandoned US 60 over Devil's Canyon, Superior vicinity, 88001681

Kelvin Bridge, (Vehicular Bridges in Arizona MPS), Florence-Kelvin Hwy. over the Gila River, Kelvin, 88001646

Mineral Creek Bridge, (Vehicular Bridges in Arizona MPS), Old US 77 over Mineral Creek, Kelvin, 88001648

Queen Creek Bridge, (Vehicular Bridges in Arizona MPS), Old Florence Hwy. over Queen Creek, Florence Junction vicinity, 88001643

Queen Creek Bridge, (Vehicular Bridges in Arizona MPS), Abandoned US 60 over Upper Queen Creek Canyon, Superior vicinity, 88001679

Sacaton Dam Bridge, (Vehicular Bridges in Arizona MPS), Gila River Indian Reservation Rd., Sacaton vicinity, 88001621

San Tan Canal Bridge, (Vehicular Bridges in Arizona MPS), Gila River Indian Reservation Rd., Sacaton vicinity, 88001622

Winkelman Bridge, (Vehicular Bridges in Arizona MPS), Old AZ 77 over the Gila River, Winkelman, 88001649

Santa Cruz County

Santa Cruz Bridge No. 1, (Vehicular Bridges in Arizona MPS), South River Rd. over the Santa Cruz River, Nogales vicinity, 88001635

Yavapai County

Broadway Bridge, (Vehicular Bridges in Arizona MPS), Broadway St. over Bitter Creek, Clarkdale, 88001651

Hell Canyon Bridge, (Vehicular Bridges in Arizona MPS), Abandoned US 89 over Hell Canyon, Drake vicinity, 88001682

Little Hell Canyon Bridge, (Vehicular Bridges in Arizona MPS), Abandoned US 89 over Little Hell Canyon, Drake vicinity, 88001684

Lynx Creek Bridge, (Vehicular Bridges in Arizona MPS), 5.9 mi. E of Prescott on Old Black Canyon Hwy., Prescott vicinity, 88001641

Perkinsville Bridge, (Vehicular Bridges in Arizona MPS), Perkinsville-Williams Rd. over Verde River, Ash Fork vicinity, 88001671

Verde River Bridge, (Vehicular Bridges in Arizona MPS), 2.7 mi. S of Paulden on

Sullivan Lake Rd., Paulden vicinity, 88001639

Walnut Creek Bridge, (Vehicular Bridges in Arizona MPS), Forest Service Rd. over Walnut Creek, Simmons vicinity, 88001673

Walnut Grove Bridge, (Vehicular Bridges in Arizona MPS), 3.5 mi. NW of Walnut Grove on Wagoner Rd., Walnut Grove vicinity, 88001637

CONNECTICUT

New Haven County

Branford Point Historic District, Roughly along Harbor St. N from Curve St. to Branford Point, also Maple St. E. from Reynolds St. to Harbor St., Branford, 88001583

FLORIDA

Volusia County

South Beach Street Historic District, Roughly bounded by Volusia Ave., S. Beach St., South St., and US 1, Daytona Beach, 88001597

INDIANA

Allen County

Wells Street Bridge, Wells St. at the St. Mary's River, Fort Wayne, 88001575

Marion County

YWCA Blue Triangle Residence Hall, 725 N. Pennsylvania St., Indianapolis, 88001574

Parke County

Ewbank, Lancelot C., House, Parke Co. Rds. 102E between 1200N and 300E, Tangier vicinity, 88001578

LOUISIANA

East Baton Rouge Parish

Louisiana State University, Baton Rouge, Highland Rd., Baton Rouge, 88001586

Rapides Parish

McNutt Rural Historic District, Belgard Bend Rd. and LA 121, McNutt, 88001595

MISSISSIPPI

Yazoo County

Home Place, 2 mi. E of MS 433, S side of Midway to Ebeneezer Rd., Benton vicinity, 88001584

NEW YORK

Oswego County

Oswego Theater, 138 W. Second St., Oswego, 88001590

NORTH CAROLINA

Alamance County

US Post Office, 430 S Spring St., Burlington, 88001594

Nash County

Spring Hope Historic District, Roughly bounded by Franklin, Louisburg, Second and Community Sts., Spring Hope, 88001591

TENNESSEE

Benton County

US Post Office, 81 N. Forest St., Camden, 88001577

Cumberland County

Cumberland Homesteads Historic District, Roughly follows County Seat and Valley Rds., Grassy Cove Rd., Deep Draw and Pigeon Ridge Rds., Crossville vicinity, 88001593

Gibson County

US Post Office, 200 S. College St., Trenton, 88001576

Lauderdale County

US Post Office, 17 E. Jackson Ave., Ripley, 88001582

VERMONT

Caledonia County

Lind Houses, Pleasant St., South Ryegate, 88001589

Orange County

Waits River Schoolhouse, VT 25 N of Waits River, Waits River vicinity, 88001592

Rutland County

Perkins, Arthur, House, 242 S. Main St., Rutland, 88001579

WEST VIRGINIA

Jefferson County

Fruit Hill, Shepherd Grade, Shepherdstown vicinity, 88001588

Marshall, James House, Shepherd Grade, Shepherdstown vicinity, 88001596

Kanawah County

Canty House, WV 25, Institute, 88001587

East Hall, West Quadrangle, West Virginia State College, Institute, 88001585

WISCONSIN

Forest County

Franklin Lake Campground, National Forest Rd. 2181, Alvin vicinity, 88001573

Waukesha County

Baer, Albert R., House, (Menomonee Falls MRA), H166 N8990 Grand Ave., Menomonee Falls, 88001645

Barnes, Andrew, House, (Menomonee Falls MRA), N89 W16840 Appleton Ave., Menomonee Falls, 88001652

Camp, Thomas, Farmhouse, (Menomonee Falls MRA), W204 N8151 Lannon Rd., Menomonee Falls, 88001670

Davis, Cyrus, Farmstead, (Menomonee Falls MRA), W204 N7776 Lannon Rd., Menomonee Falls, 88001674

Davis, Cyrus—Davis Brothers Farmhouse, (Menomonee Falls MRA), W204 N7818 Lannon Rd., Menomonee Falls, 88001672

Friederich Farmstead Historic District, (Menomonee Falls MRA), N96 W15009 County Line Rd., Menomonee Falls, 88001631

Henze, LeRoy A., House, (Menomonee Falls MRA), N89 W15781 Main St., Menomonee Falls, 88001638

Hoeltz, Herbert, House, (Menomonee Falls MRA), N87 W15714 Kenwood Blvd., Menomonee Falls, 88001636

Hoos, Elizabeth, House, (Menomonee Falls MRA), W164 N9010 Water St., Menomonee Falls, 88001640

Hoos-Rowell House, (Menomonee Falls MRA), W164 N8953 Water St., Menomonee Falls, 88001644

Koehler, Frank, House and Office, (Menomonee Falls MRA), N88 W16623 Appleton Ave., Menomonee Falls, 88001669

Lincoln High School, (Menomonee Falls MRA), N88 W16913 Main St., Menomonee Falls, 88001662

Mace, Garwin A., House, (Menomonee Falls MRA), W166 N8941 Grand Ave., Menomonee Falls, 88001650

Main Street Historic District, (Menomonee Falls MRA), Main and Appleton Sts., Menomonee Falls, 88001629

Menomonee Falls City Hall, (Menomonee Falls MRA), N88 W16631 Appleton Ave., Menomonee Falls, 88001667

Menomonee Golf Club, (Menomonee Falls MRA), N73 W13430 Appleton Ave., Menomonee Falls, 88001663

Pratt, John A., House, (Menomonee Falls MRA), N88 W15634 Park Blvd., Menomonee Falls, 88001634

Third Street Bridge, (Menomonee Falls MRA), Roosevelt Dr., Menomonee Falls, 88001647

Village Park Bandstand, (Menomonee Falls MRA), Village Park on Garfield Dr., Menomonee Falls, 88001653

Wick, Michael, Farmhouse & Barn, (Menomonee Falls MRA), N72 W13449 Good Hope Rd., Menomonee Falls, 88001665

Zimmer, Johann, Farmhouse, (Menomonee Falls MRA), W156 N9390 Pilgrim Rd., Menomonee Falls, 88001632.

[FR Doc. 88-19665 Filed 8-29-88; 8:45 am]

BILLING CODE 4310-70-M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Under Clean Water Act to Assess Penalties

In accordance with the policy of the Department of Justice, 28 CFR 50.7, 38 FR 19029, notice is hereby given that a proposed consent decree in *United States* v. *Jorge Luhring, Island Petroleum Products, Inc., Bayamon Electroplating, Inc., and Taino Plating Corp.*, Civil Action No. 87-1256 (JP), was lodged with the United States District Court for the District of Puerto Rico on August 19, 1988. This consent decree settles the United States' claims for civil penalties in a lawsuit filed September 17, 1987, pursuant to section 309 of the Clean Water Act (the "Act"), 33 U.S.C. 1319, for injunctive relief and for the assessment of civil penalties against Jorge Luhring, Island Petroleum Products, Inc. ("Island"), Bayamon Electroplating, Inc., and Taino Plating Corp. The complaint is based on, among other things, Island's discharge of pollutants from its electroplating plant in Barrio Las Palmas, Catano, Puerto Rico, in violation of the Act and applicable pretreatment standards. 40 CFR 413.14.

The Department of Justice will receive comments relating to the proposed consent decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Land and Natural Resources Division, United States Department of Justice, P.O. Box 7611, Washington, DC 20044-7611. All comments should refer to *United States* v. *Jorge Luhring, Island Petroleum Products, Inc., Bayamon Electroplating, Inc., and Taino Plating Corp.*, D.J. 90-5-1-1-2834.

The consent decree may be examined at the following offices of the United States Attorney and the Environmental Protection Agency:

EPA Region II: Contact: David Brook, Office of the Regional Counsel, U.S. Environmental Protection Agency, Region II, 26 Federal Plaza, New York, New York 10278, (212) 264-0444.

United States Attorney's Office: Contact: Eduardo E. Toro Font, Assistant United States Attorney, District of Puerto Rico, Frederico Degetau Federal Building, Carlos Chardon Avenue, Hato Rey, Puerto Rico 00918, (809) 753-4656.

Copies of the proposed consent decree may also be examined at the environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, Room 6314, Ninth Street and Pennsylvania Avenue, NW., Washington, DC 20044-7611. A copy of the proposed consent decree may be obtained by mail from the Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice. When requesting a copy of the proposed consent decree, please enclose a check for copying costs (at $.10 per page) in the amount of $1.80 payable to the Treasurer of the United States.

Roger J. Marzulla,

Assistant Attorney General, Land and Natural Resources Division.

[FR Doc. 88-19592 Filed 8-29-88; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Office of the Secretary

Agency Recordkeeping/Reporting Requirements Under Review by the Office of Managemernt and Budget (OMB)

Background:

The Department of Labor, in carrying out its responsibilities under the Paperwork Reduction Act (44 U.S.C. Chapter 35), considers comments on the reporting and recordkeeping requirements that will affect the public.

List of Recordkeeping/Reporting Requirements Under Review:

As necessary, the Department of Labor will publish a list of the Agency recordkeeping/reporting requirements under review by the Office of Management and Budget (OBM) since the last list was published. The list will have all entries grouped into new collections, revisions, extensions, or reinstatements. The Departmental Clearance Officer will, upon request, be able to advise members of the public of the nature of the particular submission they are interested in.

Each entry may contain the following information:

The Agency of the Department issuing this recordkeeping/reporting requirement.

The title of the recordkeeping/reporting requirement.

The OMB and Agency identification numbers, if applicable.

How often the recordkeeping/reporting requirement is needed.

Who will be required to or asked to report or keep records.

Whether small businesses or organizations are affected.

An estimate of the total number of hours needed to comply with the recordkeeping/reporting requirements and the average hours per respondent.

The number of forms in the request for approval, if applicable.

An abstract describing the need for and uses of the information collection.

Comments and Questions

Copies of the recordkeeping/reporting requirements may be obtained by calling the Departmental Clearance Officer, Paul E. Larson, telephone (202) 523-6331. Comments and questions about the items on this list should be directed to Mr. Larson, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue, NW. Room N-1301, Washington, DC 20210. Comments should also be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for (BLS/DM/ESA/ETA/OLMS/OSHA/PWBA/VETS), Office of Management and Budget, Room 3208, Washington, DC 20503 (Telephone (202) 395-6880).

Any member of the public who wants to comment on a recordkeeping/reporting requirement which has been submitted to OMB should advise Mr. Larson of this intent at the earliest possible date.

New

Departmental Management

National SAS Farmworker Survey (Seasonal Agricultural Services)

Individuals or households; farms; Businesses or other for-profit; 3,700 respondents; 1 hour; 1 hour per response; 1 form

The Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act (IRAC) requires the DOL and the USDA to estimate the departure rate from Seasonal Agricultural Services (SAS) agriculture and to analyze information about wages, working conditions and recruitment practicers. This survey will gather data necessary to make these estimates and carry out these analyses.

Bureau of Labor Statistics

Cognitive Research on the Consumer Expenditure Surveys questionnaire

Nonrecurring (One-time)

Individuals or households; 2800 respondent; 2800 total hours; 60 minutes per response; 3 forms

The proposed "Cognitive Research on CE questionnaires" will determine ways to improve the wording of questions to facilitate the respondents' participation which in turn will reduce the respondent burden. In addition, the results of the research will also guide the next sample redesign efforts.

Signed at Washington, DC, this 25th day of August, 1988.

Terry O'Malley,

Acting Departmental Clearance Officer.

[FR Doc. 88-19727 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-23-M

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply For Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or

1c

threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than September 9, 1988.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than September 9, 1988.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street, NW., Washington, DC 20213.

Signed at Washington, DC, this 22nd day of August 1988.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner: Union/workers/firm	Location	Date received	Date of petition	Petition No.	Articles produced
Accurate Die Casting, Co. (Workers)	Fayetteville, NY	8/22/88	8/9/88	20,880	Alum and zinc castings.
Beehive International (Company)	Salt Lake City, UT	8/22/68	8/9/88	20,881	Computer terminals.
Discovery Systems (Workers)	Dublin, OH	8/22/88	8/3/88	20,882	Audio Compact Discs and CD-rooms.
Electronic Molding Corp. (Workers)	Woonsocket, RI	8/22/88	8/4/88	20,883	Electronic components.
Precision Automatic, Corp. (Workers)	......do	8/22/88	8/4/88	20,884	Do.
Wrapex Corp. (Workers)	......do	8/22/88	8/4/88	20,885	Do.
F.H. Lawson Co. (Workers)	Cincinnati, OH	8/22/88	8/11/88	20,886	Do.
ITT Power Systems, (IAM&AW)	Galion, OH	8/22/88	8/8/88	20,887	Power systems.
ITT Rayonier, Peninsula Plywood Div. (IWA)	Port Angeles, WA	8/22/88	8/10/88	20,888	Cedar and fir plywood siding.
Jack Cooper Transport (Company)	Arlington, TX	8/22/88	7/29/88	20,889	Transportation of cars.
Reliance Button Co., Inc. (Company)	New York, NY	8/22/88	8/3/88	20,890	Buttons and pins.
Universal Optical Co. (Workers)	Attleboro, MA	8/22/88	8/5/88	20,891	Eyeglass frames.

[FR Doc. 88-19728 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-30-M

Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for adjustment assistance issued during the period August 8, 1988—August 12, 1988 and August 15, 1988—August 19, 1988.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each of the group eligibility requirements of section 222 of the Act must be met.

(1) That a signficant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated,

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

Negative Determinations

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-20,724; Federal Steel & Wire Corp., Cleveland, OH

TA-W-20,725; Ideal Basic Industries, Ada, OK

TA-W-20,726; Lipe Corp., Syracuse, NY

TA-W-20,721; Clearwater Printing & Finishing Co., Clearwater, SC

TA-W-20,762; Pioneer Parachute Co., Manchester, CT

TA-W-20,735; Leeds and Northrup Co., North Wales, PA

TA-W-20,738; Witco Corp., Canton Field Office, Canton, OH

TA-W-20,752; Brevel Motors, Inc., Carlstadt, NJ

In the following cases the investigation revealed that criterion (3) has not been met for the reasons specified.

TA-W-20,731; At-A-Glance Division of Keith Clark, Inc., Pittsfield, MA

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-20,754; Huls America (Formerly Dynamit Nobel of America), Rockleigh, NJ

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-20,813; Fashion Barn, Inc., Saddlebrook, NJ

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA-W-20,756; General Electric Co., Motor Business Dept., Decatur, IN

Increased imports did not contribute importantly to workers separations at the firm.

TA-W-20,753; Consolidation Coal Co., Pursglove, No. 15 Mine, Osage, WV

U.S. imports of coal in 1987 and January through March 1988 were negligible.

Affirmative Determinations

TA-W-20,737; Schlage Lock Co., Rocky Mount, NC

A certification was issued covering all workers separated on or after May 26, 1987.

TA-W-20,736; Martin Shirt Co., Shenandoah, PA

A certification was issued covering all workers separated on or after June 9, 1987 and before July 30, 1988.

TA-W-20,733; Hasley Taylor/Thermos, Taftville, CT

A certification was issued covering all workers separated on or after June 7, 1987.

TA-W-20,748; Stewart Warner Corp., Bassick Div., Bridgeport, CT

A certification was issued covering all workers separated on or after June 13, 1987.

I hereby certify that the aforementioned determinations were issued during the period August 8, 1988—August 12, 1988 and August 15, 1988—August 19, 1988. Copies of these determinations are available for inspection in Room 6434, U.S. Department of Labor, 601 D Street, NW. Washington, DC 20213 during normal business hours or will be mailed to persons who write to the above address.

Dated: August 23, 1988.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 88-19729 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-30-M

Mine Safety and Health Administration

[Docket No. M-88-157-C]

BethEnergy Mines, Inc.; Petition for Modification of Application of Mandatory Safety Standard

BethEnergy Mines, Inc., Pennsylvania Division, P.O. Box 143, Eight Four, Pennsylvania 15330 has filed a petition to modify the applications of 30 CFR 75.1101-1(b) (deluge-type water spray systems) to its 84 Complex, Livingston Portal (I.D. No. 36-00958) located in Washington County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that nozzles attached to the branch lines be full cone, corrosion resistant and provided with blow-off dust covers.
2. As an alternate method, petitioner proposes that—
   (a) Blow-off dust covers would be eliminated;
   (b) A functional test of the system would be completed once per week; and
   (c) A record of these tests would be maintained.
3. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before Septermber 29, 1988. Copies of the petition are available for inspection at that address.

Date: August 24, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-19719 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-79-C]

Castle Gate Coal Co.; Petition for Modification of Application of Mandatory Safety Standard (Amendment)

Castle Gate Coal Company, P.O. Box 449, Helper, Utah 84526 has filed an amendment to a petition for modification. On April 3, 1988, Castle Gate Coal Company, submitted a petition to modify the application of 30 CFR 75.503 (permissable electric face equipment) to its Mine No. 3 (I.D. No. 42-00165) located in Carbon County, Utah. On June 1, 1988, MSHA published notice of the petition in the **Federal Register** (53 FR 20029), allowing interested parties 30 days to submit comments. On July 26, 1988, petitioner submitted a request to amend the originally submitted petition for modification. The amendment is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that trailing cables be 500 feet.
2. Development in the 10th East panel will be by means of a three-entry system with crosscuts and entries on 104-foot by 140-foot centers and 140-foot by 100-foot centers. The size of the coal blocks is required due to the geological characteristics of the property. The size of the coal blocks requires the use of either longer trailing cables or distribution boxes. Longer trailing cables would be more easily protected from mechanical damage than distribution boxes. Distribution boxes are difficult to protect due to 16-foot-wide entries dictated by roof conditions and due to pitched seam and water problems.
3. As an alternate method, petitioner proposes to use 800 feet of No. 6 AWG trailing cables on shuttle cars and 650 feet of No. 6 AWG trailing cables on roof bolting machines.
4. Petitioner states that increasing the length of the shuttle car cables to 800 feet, and increasing the length of the roof bolter cables to 650 feet would eliminate the need for backspooling and the addition of junction boxes. Backspooling causes undue wear and damage to the trailing cable which results in premature failure and/or breakdown of the cable. This cable damage creates a greater potential for fire and shock hazards to occur. Elimination of junction boxes reduces required system maintenance and also eliminates another potential sources of fire and shock hazards.
5. Petitioner further states that no voltage-drop, motor overheating, dropping out of contractors, or starting problems due to low-voltage have been encountered with the machines.
6. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this amendment to the petition for modification may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 29, 1988. Copies of the amendment and the original petition for modification are available at that address.

Dated: August 24, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-19720 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-146-C]

Consolidation Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Consolidation Coal Company, Consol Plaza, Pittsburgh, Pennsylvania 15241 has filed a petition to modify the application of 30 CFR 75.902 (low- and medium-voltage ground check monitor circuits) to its Rend Lake Mine (I.D. No. 11-00601) located in Jefferson County, Illinois. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that low- and medium-voltage resistance grounded systems include a fail-safe ground check circuit to monitor continuously the grounding circuits to assure continuity. The ground check will cause the circuit breaker to open when either the ground or pilot wire is broken.

2. As an alternate method, petitioner proposes to design and install low- and medium-voltage, 3-phase alternating current, resistance grounded circuits underground without ground wire monitoring conditioned upon compliance with the following:

(a) All circuits would be protected by circuit breakers to provide protection against undervoltage, grounded phase, short circuit and overcurrent;

(b) The source resistance grounded system would comply with all the requirements, with the addition of a potential transformer and overvoltage timing relay connected across the grounding resistor;

(c) Petition would apply only to stationary permanently installed equipment;

(d) The wiring and equipment supplied power from the resistance grounded source would be installed and maintained in accordance with any applicable requirements of the 1987 National Electrical Code;

(e) The circuit conductors from the source to the equipment would be installed in grounded rigid metal conduits. If a short section of liquid tight conduit is required, it would be bonded across to assure electrical continuity. All conduit would be installed and maintained in accordance with applicable requirements of the 1987 National Electrical Code; and

(f) In addition to the conduit, a separate grounding conductor would be installed within the conduit enclosing the associated power conductors. The grounding conductor would be used to ground the enclosures of each unit of equipment to the grounded side of the source grounding resistor. The size or capacity of the grounding conductor would be in accordance with the requirements of 30 CFR 75.701–4(a)(b).

3. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 29, 1988. Copies of the petition are available for inspection at that address.

Date: August 24, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88–19721 Filed 8–29–88; 8:45 am]

BILLING CODE 4510–43–M

[Docket No. M–88–153–C]

Granny Rose Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Granny Rose Coal Company, P.O. Box 1098, Barbourville, Kentucky 40906, has filed a petition to modify the application of 30 CFR 75.313 (methane monitor) to its No. 2 Mine (I.D. No. 15–16215) located in Knox County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that a methane monitor be installed on any electric face cutting equipment, continuous miner, longwall face equipment and loading machine and is required to be kept operative and properly maintained and frequently tested.

2. Petitioner states that no methane has been detected in the mine. The three wheel tractors are permissible DC powered machines, with no hydraulics. The buket is a drag type, where approximately 30–40% of the coal is hand loaded. Approximately 20% of the time that the tractor is in use, it is used as a man trip and supply vehicle.

3. As an alternate method, petitioner proposes to use hand held continous oxygen and methane monitors in lieu of methane monitors on three wheel tractors. In further support of this request, petitioner states that:

(a) Each three wheel tractor will be equipped with a hand held continuous monitoring methane and oxygen detector and all persons will be trained in the use of the detector;

(b) A gas test will be performed, prior to allowing the coal loading tractor in the face area, to determine the methane concentration in the atmosphere. The air quality will be monitored continuously after each trip, provided the elapsed time between trips does not exceed 20 minutes. This will provide continuous monitoring of the mine atmosphere for methane to assure the detection of any undetected methane buildup between trips;

(c) If one percent of methane is detected, the operator will manually deenergize his/her battery tractor immediately. Production will cease and will not resume until the methane level is lower than one percent;

(d) A spare continuous monitor will be available to assure that all coal hauling tractors will be equipped with a continuous monitor;

(e) Each monitor will be removed from the mine at the end of the shift, and will be inspected and charged by a qualified person. The monitor will also be calibrated monthly; and

(f) No alterations or modifications will be made in addition to the manufacturer's specifications.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish writen comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 29, 1988. Copies of the petition are available for inspection at that address.

Date: August 22, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88–19722 Filed 8–29–88; 8:45 am]

BILLING CODE 4510–43–M

[Docket No. M–88–144–C]

The Helen Mining Co.; Petition for Modification of Application of Mandatory Safety Standard

The Helen Mining Company, R.D. No. 2, Box 2110, Homer City, Pennsylvania 15748–9558 has filed a petition to modify the application of 30 CFR 75.1100–3(b) (quantity and location of firefighting equipment) to its Homer City Mine (I.D. No. 36–00926) located in Indiana County, Pennsylvania. The petition is filed under section 101(c) of the Federl Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that waterlines be installed parallel to the entire length of belt conveyors.

2. Petitioner states that, due to severe winter weather, freezing conditions are encountered to fully charged waterlines installed near the slope opening continuing inby approximately 2,000 feet, along the slope belt conveyor.

3. As an alternate method, petitioner proposes to install an automatic dry pipe suppression system incorporating various safeguards as follows:

(a) The automatic dry pipe suppression system would only be used from October through April, and would only apply to the waterline located along the slope belt conveyer;

(b) An electric solenoid water valve would be provided to automatically charge the waterline when the automatic fire warning system for the belt conveyor is activated;

(c) A manual bypass valve would be installed in conjuction with the electric solenoid valve, so that the waterline can be charged during a power failure or in the event that the solenoid valve should fail to operate;

(d) A visual means would be provided to indicate that a supply of water under pressure is available to the electric and manual valve;

(e) The valve would be protected from freezing and would be readily accessible for inspection or manual operation;

(f) The automatic fire warning system, including the electric valve and the manual bypass valve would be inspected weekly and a functional test of the complete system would be made at least annually. The functional test would include charging the waterline by activating the electric valve with the automatic fire warning system for the slope belt. A record of the weekly inspection and annual functional test would be maintained by the operator;

(g) The dry pipe system would be purged of water left in the system as a result of testing or accidential actuation of the system to prevent ice from accumulating in the line and valves;

(h) A responsible person would be located on the surface at all times and would be trained in the procedures to follow in the event it becomes necessary to manualy activate the system; and

(i) All persons in the area of the slope would be instructed as to the operation of the dry pipe system.

4. Petitioner states that the proposed alternate method wil provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 29, 1988. Copies of the petition are available for inspection at that address.

Date: August 23, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-19723 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-142-C]

Lisa Lee Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Lisa Lee Coal Company, Box 25, Raven, Virginia 24639 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Mine No. 2 (I.D. No. 44-03600) located in Buchanan County, Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that aircourses and an abandoned panel be examined in their entirety on a weekly basis.

2. Petitioner states that, due to roof falls and adverse conditions within the Left Mains Panel of the 001 Section weekly examinations would result in a serious hazard to the health and safety of certified personnel.

3. As an alternate method, petitioner proposes to take the following measures:

(a) Place barriers (wire fencing) along with danger signs at the entrances to the Left Mains Section;

(b) Setup checkpoints on the intake airway at spad station #G715 and on the return airways which are to both the right and left of the return airway at spad stations #F720 and #F725;

(c) Monitor quantity and quality of air entering and leaving the abandoned section. Methane has never been detected in this mine with either a flame safety lamp or an approved methane detector by mine officials;

(d) Examinations for air quality/quantity would be conducted on a weekly basis and a log would be kept at the checkpoints. The log would be maintained and updated after weekly examinations; and

(e) Any variation to the "normal" air readings would initiate immediate corrective measures.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 29, 1988. Copies of the petition are available for inspection at that address.

Dated: August 23, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-19724 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-145-C]

New Era Coal Co. Inc.; Petition for Modification of Application of Mandatory Safety Standard

New Era Coal Company, Inc., 29501 Mayo Trail, Catlettsburg, Kentucky 41129 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Mine No. 1 (I.D. No. 15-10753) located in Pike County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petititoner's statement follows:

1. The petition concerns the requirement that intake aircourses be examined in their entirety on a weekly basis.

2. Petitioner states, that, due to unsafe roof conditions and rock falls the idled area of the mine cannot be safely traveled. To restore one entry to a safe travelable condition, would require six months of hazardous work for the miners.

3. As an alternate method, petitioner proposes to establish four evaluation points, one at the beginning, one in the

middle, and two at the end of the idled area, where a qualified person can examine the quantity and quality of air used to ventilate the idled area. These examinations would be made twice a week, instead of weekly, and recorded in the pre-shift/on-shift examination book.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before (September 29, 1988. Copies of the petition are available for inspection at that address.

Date: August 23, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-19725 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-88-155-C]

WESCO Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

WESCO Coal Company, Route 1, Box 279-A, Gray, Kentucky 40734 has filed a petition to modify the application of 30 CFR 75.313 (methane monitor) to its Mine No. 1 (I.D. No. 15-16405) located in Knox County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that a methane monitor be installed on any electric face cutting equipment, continuous miner, longwall face equipment and loading machine and is required to be kept operative and properly maintained and frequently tested.

2. Petitioner states that no methane has been detected in the mine. The three wheel tractors are permissible DC powered machines, with no hydraulics. The bucket is a drag type, where approximately 30-40% of the coal is hand loaded. Approximately 20% of the time that the tractor is in use, it is used as a man trip and supply vehicle.

3. As an alternative method, petitioner proposes to use hand held continuous oxygen and methane monitors in lieu of methane monitors on three wheel tractors. In further support of this request, petitioner states that:

(a) Each three wheel tractor will be equipped with a hand held continuous monitoring methane and oxygen detector and all persons will be trained in the use of the detector;

(b) A gas test will be performed, prior to allowing the coal loading tractor in the face area, to determine the methane concentration in the atmosphere. The air quality will be monitored continuously after each trip, provided the elapse time between trips does not exceed 20 minutes. This will provide continuous monitoring of the mine atmosphere for methane to assure the detection of any undetected methane buildup between trips;

(c) If one percent of methane is detected, the operator will manually deenergize his/her battery tractor immediately. Production will cease and will not resume until the methane level is lower than one percent;

(d) A spare continuous monitor will be available to assure that all coal hauling tractors will be equipped with a continuous monitor;

(e) Each monitor will be removed from the mine at the end of the shift, and will be inspected and charged by a qualified person. The monitor will also be calibrated monthly; and

(f) No alterations or modifications will be made in addition to the manufacturer's specifications.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that afforded by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before September 29, 1988. Copies of the petition are available for inspection at that address.

Date: August 22, 1988.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 88-19726 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-43-M

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 88-87; Exemption Application No. D-7277, 7278, 7279 et al.]

Grant of Individual Exemptions; Harris Trust and Savings Bank (Harris) et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: GRANT OF INDIVIDUAL EXEMPTIONS.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1954 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of pendency were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

Harris Trust and Savings Bank (Harris); Located in Chicago, Illinois

[Prohibited Transaction Exemption 88-87; Exemption Application Nos. D-7277, D-7278 and D-7279]

Exemption

The restrictions of section 406(a)(1) (A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to the lending by Harris to Merrill Lynch Canada, Inc. of securities that are assets of employee benefit plans and trusts for which Harris acts as trustee, co-trustee, investment manager, custodian or agent, provided the conditions set forth in the notice of proposed exemption are met.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on June 7, 1977, at 53 FR 20917.

Written Comments: The Department received a written comment which expressed approval of the proposed transactions that are described in the notice of proposed exemption. Accordingly, the Department has considered the entire record, including the comment letter received, and has determined to grant the exemption as it was proposed.

For Further Information Contact: Paul Kelty of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

Morison Securities, Inc. (Morison); Located in Minneapolis, Minnesota

[Prohibited Transaction Exemption 88-88; Exemption Application No. D-7336]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the acquisition by various individuals who are clients of Morison of certain public limited partnership units (the Units) from their individual retirement accounts (the IRAs), their Keogh plans (the Keoghs) or their profit sharing plans (the PS Plans) for cash, provided the IRAs, Keoghs and PS Plans receive no less than the fair market value of the Units on the dates of the sales.[1]

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on June 7, 1988 at 53 FR 20919.

For Further Information Contact: Gary H. Lefkowitz of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

Mayfield Corporation Defined Benefit Pension Plan and Trust (the Plan) Located in Houston, Texas [Prohibited Transaction Exemption 88-89; Exemption Application No. D-7467]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the loans made by the Mary Iris Goldston Corporation to the Plan, provided that the terms and conditions of the loans were at least as favorable to the Plan as those which the Plan would receive in similar transactions with unrelated parties.[1]

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on July 15, 1988 at 53 FR 26912.

Effective Date: August 17, 1987.

For Further Information Contact: Alan H. Levitas of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

Frank Pavel, D.D.S., Inc. Money Purchase Pension Plan (the Plan) Located in San Diego, California [Prohibited Transaction Exemption 88-90; Exemption Application No. D-7498]

Exemption

The restrictions of section 406(a)(1), (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed purchase of two limited partnership units by the self-directed account in the Plan of Frank Pavel, D.D.S. (Dr. Pavel), from Dr. Pavel and his wife; provided the terms and conditions of the transaction will be similar to those obtainable by the Plan in an arm's-length transaction with an unrelated party.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on July 15, 1988 at 53 Fr 26913.

For Further Information Contact: Mrs. Betsy Scott of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately described all material terms of the transaction which is the subject of the exemption.

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[1] Because the IRAs meet the conditions described in 29 CFR 2510.3-2(d), there is no jurisdiction under Title I of the Act with respect to the IRAs. Because there are no employees covered under the Keoghs and PS Plans, there is no jurisdiction under Title I of the Act with respect to the Keoghs and PS Plans pursuant to 29 CFR 2510.3-3(b). However, there is jurisdiction with respect to the IRAs, PS Plans and the Keoghs under Title II of the Act pursuant to section 4975 of the Code.

[1] Since Mr. Jack H. Mayfield, Jr. is the only participant in the Plan there is no jurisdiction under Title I of the Act pursuant to 29 CFR 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

Signed at Washington, DC, this 25th day of August, 1988.

Robert J. Doyle,

Acting Director of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 88-19713 Filed 8-29-88; 8:45 am]

BILLING CODE 4510-29-M

[Application No. D-7454 et al.]

Proposed Exemptions; State Street Bank and Trust Company (the Bank) et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1954 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Pendency, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state the reasons for the writer's interest in the pending exemption.

ADDRESS: All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Regulations and Interpretations, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Attention: Application No. stated in each Notice of Pendency. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefit Programs, U.S. Department of Labor, Room N-4677, 200 Constitution Avenue NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of pendency are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

State Street Bank and Trust Company (the Bank); Located in Boston, Massachusetts

[Application No. D-7454]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 406(b)(2) of the act shall not apply to: (1) The proposed purchase and sale of equity securities between collective investment index funds (the Index Funds) sponsored by the Bank; (2) the proposed purchase and sale of equity securities between the Index Funds and various model-driven collective investment funds (the Model-Driven Funds) sponsored by the Bank; (3) the proposed purchase and sale of equity securities between the Model-Driven Funds; and (4) the proposed purchase and sale of equity securities between the Index Funds or Model-Driven Funds (together, the Funds) and various large pension plans (the Large Plans), under the terms and conditions set forth in this notice of proposed exemption.

Summary of Facts and Representations

1. The Bank is a Massachusetts trust company which is subject to the supervision and examination of the Massachusetts Commissioner of Banks. The Bank is a member of the Federal Reserve Bank and its depositors' accounts are insured by the Federal Deposit Insurance Corporation. The Bank manages substantial amounts of assets, typically as a trustee or investment manager, for a variety of clients, including employee benefit plans subject to Title I of the Act (the Client Plans). The Bank's client accounts may be managed either as separate accounts for a single client or as commingled accounts (for example, group trusts organized pursuant to Rev. Rul. 81-100) for multiple clients (the Client Accounts).

2. The Bank is one of the largest investment managers in the United States in the area of passive investment management. Passive management involves investment in a fixed portfolio of securities, rather than a portfolio which changes according to an ongoing "active" evaluation of the desirability of particular equity securities. The Bank states that approximately $18.3 billion of its assets under management as of August 21, 1987 consisted of domestic and foreign equity securities being passively managed in the Index Funds and the Model-Driven Funds. Approximately $16.5 billion of the assets of the Funds are assets of the Client Plants.

The Bank has no beneficial ownership interest in any of the Funds. However, the Bank does maintain a defined benefit pension plan and a 401(k) savings plan for its eligible employees (the Bank Plans). The Bank states that the assets of the Bank Plans are invested from time to time in one or more Index Funds or Model-Driven Funds. As of August 31, 1987, the aggregate value of the assets of the Bank Plans was approximately $118.2 million.

3. The assets managed by the Bank in the Index Funds are invested pursuant to a strategy which attempts to replicate the performance of a predetermined third-party index, such as the Standard & Poor's 500 Composite Stock Price Index (the S&P 500 Index). The assets managed by the Bank in the Model-Driven Funds are invested pursuant to a strategy whereby investments are made in accordance with predetermined computer models. The applicant states that because the Funds are passively managed, the holdings of each Fund remain static unless one of several potential "trigger events" occurs.

First, an independent third party, such as Standard and Poors (S&P), may change the makeup of its index, which would require corresponding changes in the make-up of the portfolio of the Index Funds corresponding to that index.

Second, a threshold screen applied by the Bank may eliminate certain securities from the Index Fund or Model-Driven Fund even though such securities continue to be incldued in the related index or mdoel. Such a screening process may occur when the companies issuing the particular securities declare bankruptcy or are involved in an acquisition or merger. However, the Bank excludes relatively few securities of companies from its Index Fund portfolios for such reasons at any given time. The Bank states that, as a general rule, it will follow the decision of the third party creator of the index and will not exclude a security until it has been dropped from the index by the third party. For example, when Texaco, Inc., went into bankruptcy, its stock was not dropped from the S&P 500 Index and, therefore, the stock was retained in the Bank's S&P Index Funds. However, as an exception to the general rule situations may arise where the Bank's screening process may produce a "trigger event". For example, a successful tender offer may be made for a security that has been held in the Index Fund. In such cases, the Bank states that the Index Fund typically will tender its position in that security. Thus, even though S&P may continue to carry the security in the S&P 500 Index until the tender offer transaction has finally closed, the Bank will not attempt to acquire additional shares of that security in order to maintain its position. Rather, the Bank states that it will invest the cash proceeds of the tendered securities in its short term investment vehicles until a replacement security has been chosen by S&P and will then reposition the Bank's S&P Index Fund in that new security. The Bank notes that relatively few securities held in the Funds' portfolios are subject to tender offer transactions at any particualr time.

Third, the computer model upon which a particular Model-Driven Fund is based may change as a result of a change in the underlying objective criteria. Such criteria for the computer model are either prepared by an independent organization and made available to the Bank or are the product of investment strategies developed by the Bank's personnel.

For example, the investment objective of a particular Model-Driven Fund may be to track as closely as possible the performance of the S&P 500 Index, without having the Fund invest in all 500 securities of the S&P 500 Index. In order to accomplish this result, the Bank may use an "optimizer" computer program, prepared by an independent organization, which selects the 200 representative securities that are most likely to track the performance of the S&P 500 Index. Alternatively, the Bank might utilize an approach whereby those stocks in the S&P 500 Index which have the smallest capitalization would be excluded. Under either of these two approaches, once the approach has been selected for the particular Model-Driven Fund, everything is driven automatically by either the "optimizer" computer program or by the capitalization of the various stocks in the S&P 500 Index.

Fourth, the net amount available for investment in the particular Index Fund or Model-Driven Fund may increase or decrease, either due to the receipt of income which must be reinvested, the addition of assets to the Client Account, or the withdrawal of assets from the Client Account. The applicant states that in the case of the Client Plans, all such additions or deletions are made at the direction of an independent fiduciary. However, in the case of the Bank Plans, the additions or deletions are made at the direction of the Bank.

4. The applicant represents that since the Index Funds and the Model-Driven Funds are passively managed portfolios, the need to purchase or sell a particular security arises as the result of the occurrence of one of the triggering events described above. Such "trigger events" are, in most cases, the result of an event which occurs independent of any exercise of investment discretion by the Bank. Therefore, the Bank states that the amount, nature and timing of trades for both the Index Funds and the Model-Driven Funds, in most cases, are not subject to the exercise of any material degree of discretion by the Bank. The Bank notes that it would be exercising discretion in the context of trades which might arise by reason of the Bank's exercise of its discretion to change the computer models upon which certain of its Model-Driven Funds are based. However, the Bank represents that any cross-trade opportunities which arise by reason of its discretionary changes to the underlying computer models (i.e. the third triggering event described above) for any of the Mode-Driven Funds would not be executed with respect to those Funds. The Bank also notes that it would be exercising discretion in the context of cross-trades which arise as a result of additions or deletions to a Fund made by the Bank Plans. However, the Bank represents further that the Funds would be able to take advantage of cross-trade opportunities with a Fund that has produced a "trigger event" as a result of the additions or deletions made to that Fund by one of the Bank Plans only in certain limited circumstances (see Paragraph #10).

With respect to the timing of the transactions once a "trigger event" has occurred, the Bank states that it attempts to replicate any changes in the underlying index or model as quickly as possible. For example, when assets are deposited in an Index Fund, assets to be invested in domestic securities are typically invested within three days. If the assets are deposited in an international Index Fund, the Bank states that the orders are typically placed with independent brokers within three days, although the actual execution of those orders may take longer depending upon the particular overseas market. The Bank states further that if assets are being withdrawn from a Fund and sales must be made, such sales are typically implemented within three days of the withdrawal.

5. The applicant states that the Funds are often required to sell a particular security when one or more of the other Funds will be in the process of purchasing that same security. If the Funds effect the required transactions on the open market, each Fund incurs substantial transaction costs, including brokerage commissions, the so-called "marketmaker's spread", and the potential adverse market impact which may be caused by the trade itself.

The Bank states that if it were able to effect these transactions by means of a pre-arranged direct cross-trade between the Funds that must sell the particular security and the Funds which must buy that same security, the Bank could substantially reduce the amount of the commission costs for the Funds, and could eliminate entirely the marketmaker's spread and any potential for adverse market impact. Based on a review of the potential direct cross-trade opportunities during the period from January 1, 1987 to September 30, 1987, the Bank estimates that the ability to effect direct cross-trades would generate substantial savings to the Funds. The Banks states that the proposed cross-trading of the securities between the various Funds would be effected as quickly as possible, generally within three days.

6. In addition to transactions arising in connection with the automatic trading activities of the Index Funds and Model-Driven Funds, the Bank states that it is often retained to assist one of the Large Plans in liquidating all or a substantial portion of the securities held by the Large Plan. In such situations, the Bank acts as a "trading adviser" to the Large Plan. Each of the Large Plans has total

assets of at least $50 million. The Bank states that it is not a fiduciary for the Large Plan with respect to the underlying asset allocation decision which results in the Large Plan allocating assets to the Funds. Specifically, the Bank is not a fiduciary by reason of investment advice to the Large Plan when acting in the role of "trading adviser" to the Large Plan. Typically, the Bank's role as a "trading adviser" involves only advice on the mechanical aspects of accomplishing the Large Plan's asset allocation decision, such as arranging for the stock transactions so as to minimize transaction costs. Such liquidations are the result of the decision of an independent plan fiduciary to restructure the portfolio, in some cases to allow such portfolio to be managed by the Bank as an Index Fund or a Model-Driven Fund and in other cases to facilitate the realignment of the portfolio in connection with a change in investment managers or investment strategy. The applicant states that in the course of these restructrurings, the Large Plan will often be selling certain securities which the Funds are simultaneously in the process of purchasing as a result of a "trigger event." In such cases, the Large Plan and the Funds effect the transactions on the open market and, as a result, both the Large Plan and the Funds incur the transaction costs described above.

7. The Bank represents that it would be in the best interest of the Plan Clients and the Large Plan for direct cross-trades to be arranged and effected to the maximum extent possible. The Bank states that the avoidance or reduction of transaction costs made possible by direct cross-trading between the Funds, or between the Funds and the Large Plans, would be an economic benefit to the Plan Clients and the Bank Plans.

8. The Bank represents that it would receive its customary investment management or trustee fees with respect to the Plan Clients and its fee for acting as "trading adviser" to a Large Plan. However, the Bank would not receive any additional compensation on account of its effecting the direct cross-trades. The Bank represents further that to the extent that it is necessary to utilize a broker-dealer, all direct cross-trades would be effected through an independent broker-dealer which is not affiliated with the Bank. The Bank anticipates that the utilization of such an independent broker-dealer may be necessary in some cases to efficiently process the mechanical aspects of the direct cross-trade, particularly when the Bank is not the custodian or trustee for both parties to the transaction. For example, the need for an independent broker-dealer may arise in the context of transactions between the Funds, for which the Bank is the trustee or custodian, and one of the Large Plans, for which the Bank is only a "trading adviser" for the transaction and not a trustee or custodian for the assets of the Large Plan involved. The Bank states that where it is the trustee or custodian for both parties, the Bank may be able to efficiently process the mechanical aspects of the trade without the involvement of any broker-dealer, thereby resulting in the complete avoidance of any brokerage commissions. In no event would the Bank or any of its affiliates receive any brokerage commissions or other additional compensation as result of the direct cross-trades.

9. The Bank represents that all direct cross-trades would be for cash effected at a price equal to the closing price reported by the independent pricing service customarily utilized by the Bank for purposes of valuing the particular equity securities (and in the case of foreign securities, the particular currency). The independent pricing service used by the Bank gathers price information from all the relevant sources (i.e. the New York Stock Exchange, the American Stock Exchange, NASDAQ, etc.) and compiles the information into a format which is usable by the Bank. The Bank states that in the event that the number of shares of a particular security which all of the Funds and Large Plans propose to sell on a given day exceeds the number of shares of such security which all the Funds or the Large Plans propose to buy, or vice versa, the direct cross-trade opportunity would be allocated among potential sellers or buyers on the basis of a queue system.

The Bank proposes to utilize an approach whereby all investment funds would be placed in a queue, initially in alphabetical order. Any new Funds would be placed at the end of the queue as they come on line. Thus, the queue system would merely establish a listing of the Funds as potential buyers or sellers of securities. When cross-trade opportunities arise, the Bank would go down the list matching any buyers and sellers in the order in which they appear on the list until one side of the transaction or the other has been fully exhausted. The Bank states that after each cross-trade opportunity, the Fund at the top of the list would be rotated to the bottom of the list, regardless of whether that Fund participated in the cross-trade. Thus, the applicant states that since the queue moves up by one Fund after each cross-trade opportunity, all the Funds would have an opportunity to participate in direct cross-trading opportunities.

10. The Bank states that when direct cross-trades occur between the Funds and one or more of the Large Plans, the transactions would be effected only if the following conditions are satisfied: 1) The Large Plan's fiduciary, which is independent of the Bank, is fully informed in writing in advance of the cross-trading opportunity; 2) such fiduciary provides advance written approval, authorizing the Bank to engage in a cross-trade transaction; and 3) the Large Plan's fiduciary is informed in writing of the results of all direct cross-trading activity.

With respect to the participation of the Bank Plans in the Funds which would engage in the proposed direct cross-trading program, the Bank states that a Fund would not be eligible to participate in the cross-trading opportunities if the assets of the Bank Plans in the Fund exceed 10% of the total assets of the Fund. In addition, the Bank states that even if the 10% limitation is satisfied with respect to a particular Fund, the Fund would not be eligible to participate in direct cross-trading opportunities if the triggering event for the cross-trade opportunity involves the deposit of assets from a Bank Plan into the Fund or the withdrawal of assets by a Bank Plan from the Fund, and the Bank Plan's assets involved in such deposit or withdrawal constitute more than 5% of the total assets of the Bank Plan.

11. In summary, the applicant represents that the proposed transactions would satisfy the statutory criteria of section 408(a) of the Act because, among other things: (a) The Funds would buy or sell equity securities in direct cross-trading transactions only in response to various "trigger events" which, in most cases, arise independent of the exercise of investment discretion by the Bank; (b) the Large Plans would engage in cross-trades only in situations where the Bank has no discretion with respect to the investment decision; (c) the price for the equity securities would be the closing price for the securities on the day of trading; (d) the direct cross-trading between the Funds, or between the Funds and the Large Plans, would be conducted as quickly as possible, with securities transactions being effected generally within at least three days of the "trigger events" for the Funds; (e) the Funds and Large plans would save significant amounts of money on

brokerage commissions and other expenses normally associated with such transactions; and (f) the Bank would receive no additional fees as a result of the proposed cross-trades.

Notice to Interested Persons: A notice will be mailed by first class mail to each Plan which invests in the Funds. The notice will contain a copy of the notice of pendency of exemption as published in the **Federal Register** and an explanation of the rights of interested parties to comment on or request a hearing regarding the proposed exemption. Such notice will be sent to the above-named parties within two weks of the publication of the notice of pendency in the **Federal Register**.

For Further Information Contact: Mr. E.F. Williams of the Department, telephone (202) 523–8883. (This is not a toll-free number.)

Eastwood Printing and Publishing Company Profit Sharing Plan and Trust (the Plan); Located in Denver, Colorado

[Application No. D-7506]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 406 (a), (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the proposed sale (the Sale) by the Plan to Siegel Investment Company (SIC), a limited partnership and a party in interest with respect to the Plan, of a certain parcel of real property located in Denver, Colorado (the Property); provided that the terms and conditions of the transaction are at least as favorable to those obtainable by the Plan in an arm's-length transaction with an unrelated party.

Summary of Facts and Representations

1. The Plan is a defined contribution plan with 22 participants and total assets of $1,215,547.94 as of September 30, 1987. Noah Siegel (Mr. Siegel) is the Plan trustee and also the owner of the Employer. Mr. Siegel, his wife and two children are the owners of SIC.

2. The Property is located at 3201–3225 Blake Street, Denver, Colorado and covers a total area of 65,826 square feet. On-site improvements include a one-story building providing office and warehouse space and a paved yard with access to a railroad right-of-way. The real estate directly contiguous to the Property is owned by SIC.

On March 31, 1981, the Plan purchased the Property for $200,065 from Alfred J. Zarlengo, who, the applicant represents, is unrelated to the Plan, Mr. Siegel or SIC. During the term of its holding of the Property, the Plan expended $26,000.58 on taxes, insurance and maintenance. In addition, the Plan paid approximately $25,000 for capital improvements to the Property in 1985.

From 1981 to 1985, the Property was leased to Colorado Sheepskin Services, Inc. for $790 per month. The Property's vacant yard was also leased to contractors who were not parties-in-interest. Since August, 1987, a portion of the Property has been leased to Graphic Arts Mailing, Inc., who the applicant represents, is not a party-in-interest. The Plan received rental payments of $1,500 per month, totalling $18,000 annually under the lease. The Plan pays real estate taxes, insurance and maintenance costs estimated to be $8,400 per annum.

3. The Property's fair market value was determined as of November 5, 1985 as $315,000 by Philip J. Barkan, S.R.A. and S.R.E.A., of Denver, Colorado (the Barkan Valuation). The Property was subsequently appraised by Clifford L. Cryer, M.A.I. and S.R.P.A., and W. Earl Wilson, Associate Appraiser, of Cryer & Company Appraisers, Inc. (the Cryer Appraisal). The Cryer Appraisal determined the Property's fair market value as of October 5, 1987 to be $285,000. By update to the Cryer Appraisal as of April 22, 1988, Messrs. Cryer and Wilson considered the special value of the Property to SIC as a contiguous landowner and determined that there was none in this instance.

4. SIC now proposes to purchase the improved Property from the Plan for cash in amount of $315,000, the fair market value determined in the Barkan Valuation. SIC represents that the Plan will pay no real estate commissions or fees of any kind, including legal fees, in connection with the transaction.

5. The applicant represents that the transaction will be in the best interests of the Plan and protective of the rights of the Plan's participants and beneficiaries because it will enable the Plan to divest itself of an illiquid investment which represents approximately 25 percent of the Plan's assets. The Plan's increased liquidity resulting from the Sale will facilitate distributions to terminated employees whose interests have vested in the Plan.

6. In summary, the applicant represents that the proposed transaction satisfies the exemption criteria set forth in section 408(a) of the Act because: (a) The Plan will receive at least the appraised fair market value for the Property; (b) the Sale will be a one-time transaction; (c) the Sale will be consummated for cash; (d) the Plan will incur no cost or fees with respect to the transaction; and (e) the applicant has represented the Sale to be in the best interest and protective of the Plan and its participants and beneficiaries because it will increase the Plan's liquidity and facilitate distribution of Plan assets to them.

Tax Consequences of Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the Plan either paying less than or receiving more than fair market value such excess may be considered to be a contribution by the sponsoring employer to the plan and therefore must be examined under applicable provisions of the Internal Review Code, including sections 401(a)(4), 404 and 415.

For Further Information Contact: Mrs. Betsy Scott of the Department, telephone (202) 523–8194. (This is not a toll-free number.)

The O.C. Tanner Company Retirement and Savings Plan, the O.C. Tanner Manufacturing Retirement and Savings Plan, the O.C. Tanner Manufacturing Sales Representatives' Retirement and Savings Plan, the O.C. Tanner Employees Savings Plan and the O.C. Tanner Retirement and Savings Plan Group Trust (collectively, the Plans); Located in Salt Lake City, Utah

[Application Nos. D-7604 through D-7608]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application for section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to a series of loans (the Loans) by the Plans to the O.C. Tanner Company (the Employer), involving up to 25% of each of the Plan's assets, provided that the terms of the transactions are not less favorable to the Plans than those obtainable in arm's-length transactions with unrelated parties.

Summary of Facts and Representations

1. The Plans are qualified employee profit sharing plans and a qualified group trust with approximately 1,210 participants and total assets of approximately $26.6 million as of December 31, 1987. All of the Plans' assets are commingled in a group trust for investment purposes. The Employer is a closely held corporation engaged in the manufacture and marketing of emblematic jewelry. The trustee of the Plans is Obert C. Tanner and the administrative committee appointed to manage and administer the Plans includes Messrs. O. Don Ostler, W. Lowell Benson and Robert K. Anger, all of whom are employees of the Employer.

2. The Department granted a previous exemption to the applicant effective July 1, 1984 (Prohibited Transaction Exemption (PTE) 84–112, 49 FR 30606, July 31, 1984), to permit a series of loans by the Plans to the Employer involving up to 25% of each of the Plan's assets. The applicant requests that this exemption be expanded to include two new plans of the Employer that were not covered by the prior exemption (i.e., the O.C. Tanner Employees Savings Plan and the O.C. Tanner Retirement and Savings Plan Group Trust). The Plans propose to make the Loans over the remainder of the 10-year period which began July 1, 1984, the effective date of PTE 84–112, to the Employer involving up to, but never in excess of, 25% of the assets of each of the Plans, the amount of the Loans to be adjusted quarterly. The principal amount of the Loans will become fixed for the duration of the Loans at the end of 10 years from July 1, 1984 (i.e., June 30, 1994). That is, no additional loans will be made after June 30, 1994.

3. Loans made from the Plans are documented by one promissory note from the Employer to the group trust. Each calendar quarter representatives of the Employer meet with the Plans' independent fiduciary (see representation 7) to consider adjustment of the Loan balance. If a new Loan is to be allowed, the Employer pays off the previous Loan first and then executes a new promissory note reflecting the increased Loan balance. Prior to executing a new promissory note, the independent fiduciary reviews the process and issues a report stating that the new Loan is appropriate and suitable for the Loans.

4. The Loans will be repaid in quarterly payments of interest and principal to be made through the quarter ending June 30, 1989, each equal to the amount that would be necessary to amortize the current principal amount of the Loans at the then interest rate, in 20 equal consecutive quarterly payments. Since the entire outstanding principal balance on the Loans will vary, payments will be calculated as if the entire outstanding principal balance on the Loans were to be repaid with interest in level payments over 5 years. The Employer will be charged a rate of interest no less than the fair market rate of interest that would be charged by an unrelated lender for arms'-length loans of comparable amount, security, terms and conditions, as determined by the independent fiduciary. The interest rate will be adjusted at least annually and may be adjusted also whenever the principal amount of the Loans is increased or, in the opinion of the independent fiduciary, whenever the market rate for comparable loans changes sufficiently that a lender would reasonably be expected to request that the terms of the Loans be renegotiated. Notwithstanding the foregoing, the rate of interest on the Loans shall always equal or exceed the "prime" rate of interest charged by Chase Manhattan Bank plus two percent (2%).

5. The Loans will be secured by a first mortgage on the Employer's manufacturing facilities and related real property (the Property), located at and in the vicinity of 1930 South State Street, Salt Lake City, Utah. The mortgage will be evidenced by a standard trust deed, designating the Plans as beneficiaries and the independent fiduciary as trustee. The Property has been appraised by George Y. Fujii, an independent MAI appraiser with the firm of Reval Inc., Salt Lake City, Utah, as having a fair market value of $14,060,000 as of June 1988.[1] The Employer represents that it will add any additional collateral that may be required while the Loans are outstanding to assure that the value of the collateral is at all times equal to at least 200% of the outstanding balance of the Loans. A certified MAI appraiser will review this valuation at least annually. During the Loans' outstanding period, the Property will be kept adequately insured for the benefit of the Plans against fire or other loss at the expense of the Employer, and the independent fiduciary will determine at least annually that adequate insurance has been maintained.

6. In the event that the independent fiduciary shall retain or engage an attorney or attorneys to collect, enforce, or protect the Plans' interests with respect to the Loans, the Employer shall pay all of the costs and expenses of such collection, enforcement, or protection, including reasonable attorneys' fees, and the independent fiduciary may take judgement for all such amounts, in addition to the unpaid principal balance of Loans and accured interest thereon.

7. The trustee of the Plans will continue to appoint Kent D. Watson, C.P.A. (Mr. Watson), of Price Waterhouse, Salt Lake City, Utah, a certified public accountant who is experienced with both large and small business operations and who is the managing partner of the Price Waterhouse office in Salt Lake City, to serve as an independent fiduciary for the proposed Loans. Other than his previous service as independent fiduciary under PTE 84–112, Mr. Watson has no other relationship with the Employer or the Plans. Mr. Watson has been advised by legal counsel with regard to his duties, responsibilities, and liabilities as a fiduciary under the Act. Mr. Watson represents that he is aware of and understands the requirements of the Act and his responsibilities under it. In addition to reviewing the specific terms and conditions of the proposed Loans, Mr. Watson has represented that he will (a) Examine the Plans' investment portfolio; (b) consider the cash flow needs of the Plans; (c) give consideration to whether a sale of any of the Plans' assets is necessary; (d) examine the diversification of each Plan's assets in light of the loan investment; and (e) review the terms of the Loans to assure that they comport with the Plan's investment schemes. Mr. Watson will determine, prior to the making or increase of the Loans, that the Loans are appropriate and suitable as an investment for the Plans, that they are sound and reasonable under the circumstances and that any sale or liquidation of assets held by the Plans that might be required in order to make such loan or increase is prudent and reasonable. Mr. Watson will be responsible under the loan agreement for supervising the Loans to ensure that (1) The amount of the Loans never exceeds 25% of each Plan's assets, (2) the interest rate is always at least a fair market rate, (3) the Loans are at all times secured by a first mortgage on property worth at least 200% of the outstanding principal obligation, and (4) installments and repayment of the Loans are timely made. Mr. Waston has examined the terms of the proposed Loans and has initially determined that they are appropriate and suitable for the

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[1] This appraisal was based on the premise that the Employer would continue to reside in the buildings acting as collateral. The Employer has agreed, in the case that it moves its offices from the buildings acting as the collateral, to immediately repay all of the Loans.

Plans. He will be required to make the same determination immediately prior to consummation of each of the transactions and will be empowered and required to approve each increase in the principal amount of the Loans. He will further be empowered and directed to enforce the terms of the loan agreement between the Plans and the Employer, including bringing suit or other appropriate process against the Employer in the event of default, allowing 10 days to foreclose on the mortgage; ascertaining at least annually that the Employer is maintaining adequate insurance on the Property in the Plans' favor against fire or other lose; and reporting at least annually to the trustee of the Plans on the performance of the Loans, including whether the value of the collateral remains equal to at least 200% of the outstanding balance of the Loans.

Mr. Watson represents that all of the prior Loans were administered in accordance with the terms set forth in PTE 84-112 and that the Loans were and continue to be an appropriate investment for the Plans. As independent fiduciary, Mr. Watson will be entitled to such information from the Employer and the Plans as may reasonably be necessary to fulfill his responsibilities, and he shall be paid reasonable compensation plus reimbursement for reasonable expenses, if any, including legal or appraisal fees or costs, as agreed upon with the trustee of the Plans. The Employer may also indemnify him for his acts performed reasonably and in good faith, while acting as the independent fiduciary.

8. In summary, the applicant represents that the proposed transactions meet the statutory criteria for an exemption under section 408(a) of the Act because: (a) The Loans are secured by real estate with an appraised value that is and will remain at least twice the amount of the Loans; (b) the Employer will insure the Property and add additional collateral so that the value of collateral securing the Loans is always at least 200% of the outstanding balance of the Loans; (c) the Loans have and will continue to be administered by an independent fiduciary; and (d) the trustee and the independent fiduciary have determined that the transactions are appropriate for the Plans and in the best interest of the Plan's participants and beneficiaries and protective of their interests.

For Further Information Contact: Alan H. Levitas of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

Alton Engineering Profit Sharing Plan (the Plan); Located in Bethesda, Maryland

[Application No. D-7640]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the proposed sale by the Plan of three limited partnership interests (the Interests) and a certain parcel of improved real property (the Property) to George J. Quinn (Mr. Quinn), a disqualified person with respect to the Plan, provided that the sale price is no less than the fair market value of the Interests and the Property as of the date of sale.

Summary of Facts and Representations

1. The Plan is a profit sharing plan which, as of April 30, 1988, had one participant and total assets of approximately $1,227,725. The trustees of the Plan are Mr. Quinn and his wife, Eileen S. Quinn.

2. The sponsor of the Plan is the Alton Engineering Company (the Employer). The Employer is a Maryland corporation located at 9407 Elsmere Court, Bethesda, Maryland. Mr. Quinn is the sole stockholder of the Employer. The Employer is engaged in the business of providing general contracting services. However, the Employer has been relatively inactive since 1980 and has had only one active employee, Mr. Quinn.

The Employer decided to terminate the Plan effective April 30, 1984. At the time of termination, all of the participants in the Plan, except for Mr. Quinn, had terminated their employment with the Employer. By letter dated July 25, 1986, the Internal Revenue Service determined that the Plan was qualified upon termination. The participant's interests in the Plan were subsequently liquidated, except for the amount due to Mr. Quinn. Therefore, Mr. Quinn is the only remaining participant in the Plan.[1]

3. The Interests are described as follows:

(1) a 1.365% interest in the Columbia Pike Limited Partnership (the Columbia Pike L.P.), which owns a single parcel of improved real property located at 5600 Columbia Pike, Fairfax County, Virginia; (2) a 1.249% interest in a 37.7 acre parcel of unimproved real property located in Montgomery County, Maryland, which is owned by the Wilgus Associates Limited Partnership (Wilgus) and held by the Plan under the Paramount Development Limited Partnership (the Paramount L.P.), which is a partner with Wilgus; and (3) a 2.5% interest in the Cohen-Donnelly Associates Limited Partnership, which owns the following: (i) A garden apartment complex located on Missouri Avenue and 13th Street, NW., Washington, DC; (ii) a 3-story, walk-up apartment building located at 5301 New Hampshire Avenue, NW., Washington, DC; and (iii) and a purchase money deed of trust secured by a 3-story garden apartment development located at 7406 Hancock Avenue, Takoma Park, Maryland.

The Property is a 100% fee simple interest in certain improved real property located at 32 N Street, SE., Washington, DC.

4. The Plan acquired the Interests and the Property from unrelated parties prior to the effective date of the Act. In addition to the Interests owned by the Plan, Mr. Quinn owns a 2.5% interest in the Paramount L.P., and holds or controls, along with the Employer, a 12.6% interest in the Columbia Pike L.P. (together, the Quinn Interests). The applicant represents that the Quinn interests were acquired, in each case, at the same time that the Plan acquired its Interests in those same partnerships, which was prior to the effective date of the Act. The applicant states that part of the Quinn Interests in the Columbia Pike L.P. were later sold to other investors, some of whom are related to Mr. Quinn. The applicant states further that there haved been no additional acquisitions of ownership interests in any of the limited partnerships (the Partnerships) by either Mr. Quinn, the Employer, or the Plan.[2]

The applicant represents that neither the Property nor the underlying properties owned by the Partnerships have ever been leased to, or used by, a party in interest or disqualified person with respect to the Plan.

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[1] Because Mr. Quinn is the only participant in the Plan and the employer is wholly-owned by Mr. Quinn, there is no jurisdiction under Title I of the Act pursuant to 29 CFR 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

[2] In this proposed exemption, the Department expresses no opinion as to whether the continued holding of the Interests by the Plan and the Quinn Interests by Mr. Quinn, subsequent to the effective date of the Act, violated any provision of Part 4 of Title I of the Act.

5. The Interests and the Property were appraised on November 20, 1987 by John E. Gogarty, M.A.I. (Mr. Gogarty), an independent, qualified real estate appraiser and consultant in Washington, DC. Mr. Gogarty states that the Interests and the Property had a fair market value of approximately $347,350 and $45,000, respectively, as of November 20, 1987. Mr. Quinn proposes to purchase the Interests and the Property from the Plan for cash in an amount equal to their fair market value, as estabished by Mr. Gogarty's appraisal. The applicant states that Mr. Gogarty's appraisal will be updated for purposes of the proposed transaction and that there will be no brokerage commissions or other expenses incurred by the Plan in connection with the sale.

6. The applicant represents that the proposed transaction is in the best interests of the Plan because the Interests and the Property are not easily liquidated and that the Plan may not be able to obtain the appraised fair market value for the Interests and the Property if the Plan is forced to sell these assets on the open market. In addition, the applicant states that the Plan may lose its tax qualified status unless it is liquidated shortly. Mr. Quinn has considered taking the Interests and the Property as a distribution in kind as part of his total distribution from the Plan. However, Mr. Quinn represents that he wants to "roll over" his entire distribution from the Plan to an individual retirement account (IRA) and has had difficulty finding a corporate trustee that is willing to hold the Property and the Interests in an IRA. Therefore, Mr. Quinn believes that the proposed transaction will assist the Plan in liquidating its assets and will enable the Plan to expedite the distribution of such assets.

7. In summary, the applicant represents that the proposed transaction will satisfy the statutory criteria of section 4975(c)(2) of the Code because: (a) The sale will be a one-time transaction for cash; (b) the Plan will receive an amount equal to the fair market value of the Interests and the Property, as established by an independent, qualified appraiser; and (c) the Plan will not pay any brokerage commissions or other expenses with respect to the sale.

Notice to Interested Persons: Because Mr. Quinn is the only participant in the Plan, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons. Comments and requests for a public hearing are due 30 days from the date of publication of this proposed exemption in the **Federal Register**.

For Further Information Contact: Mr. E.F. Williams of the Department, telephone (202) 523–8883. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 25th day of August, 1988.

Robert J. Doyle,

Acting Director of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 88–19714 Filed 8–29–88; 8:45 am]

BILLING CODE 4510–29–M

NATIONAL SCIENCE FOUNDATION

Meeting; Ocean Sciences Research Advisory Panel

The National Science Foundation announces the following meeting:

Name: Advisory Panel for Ocean Sciences Research.

Date and Time: September 20–22, 1988.

Place: American Association for the Advancement of Science, 1333 H Street, NW., Washington, DC 20005. Rooms: First Floor Conference Room A, First Floor Conference Room B, Eighth Floor Conference Room, Eleventh Floor Conference Room.

Type of Meeting: Closed.

Contact Person: Dr. Michael R. Reeve, Head, Ocean Sciences Research Section, Room 609, National Science Foundation, Washington, DC 20550, Telephone (202) 357–9600.

Summary Minutes: May be obtained from the Contact Person at the above address.

Purpose of Meeting: To provide advice and recommendations concerning support for research in oceanography.

Agenda: Closed—To review and evaluate research proposals as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are within exemptions (4) and (6) of U.S.C. 552b(c), Government in the Sunshine Act.

M. Rebecca Winkler,

Committee Management Officer.

August 23, 1988.

[FR Doc. 88–19655 Filed 8–29–88; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Abnormal Occurrence Report; Section 208 Report Submitted to the Congress

Notice is hereby given that pursuant to the requirements of section 208 of the Energy Reoganization Act of 1974, as amended, the Nuclear Regulatory Commission (NRC) has published and issued another periodic report to Congress on abnormal occurrences (NUREG–0090, Vol. 11, No. 1).

Under the Energy Reorganization Act of 1974, which created the NRC, an abnormal occurrence is defined as "an unscheduled incident or event which the Commission (NRC) determines is significant from the standpoint of public health or safety." The NRC has made a determination, based on criteria published in the **Federal Register** (42 FR 10950) on February 24, 1977, that events involving an actual loss or significant reduction in the degree of protection against radioactive properties of source, specal nuclear, and byproduct material are abnormal occurrences.

The report to Congress is for the first calendar quarter of 1988. The report identifies the occurrences or events that the Commission determined to be significant and reportable; the remedial actions that were undertaken are also described. During the report period, there were three abnormal occurrences at the nuclear power plants licensed to operate: a potential for common mode failure of safety-related components due to a degraded instrument air system at Fort Calhoun; common mode failures of main steam isolation valves at Perry Unit 1, and a cracked pipe weld in a safety injection system at Farley Unit 2.

There were six abnormal occurrences at other NRC licensees: a diagnostic medical misadministration; a breakdown in management controls at the Georgia Institute of Technology research reactor facility; the release of polonium–210 from static elimination devices manufactured by the 3M Company; two therapeutic medical misadministrations, and a significant widespread breakdown in the radiation safety program at Case Western Reserve University research laboratories.

There was one abnormal occurrence reported by an Agreement State (Texas) involving radiation injury to two radiographers.

The reports also contains information updating some previously reported abnormal occurrences.

A copy of the report is available for public inspection and/or copying at the NRC Public Document Room, 1717 H. Street, NW., Washington DC 20555, or at any of the nuclear power plant Local Public Document Rooms throughout the country.

Copies of NUREG–0090, Vol. 11, No. 1 (or any of the previous reports in this series), may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013–7082. A year's subscription to the NUREG–0090 series publication, which consists of four issues, is also available.

Copies of the report may also be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

Dated at Bethesda, MD, this 24th day of August 1988.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 88–19675 Filed 8–29–88; 8:45 am]

BILLING CODE 7590–01–M

[Dockets Nos. 50–315 and 50–316]

Indiana Michigan Power Co., Donald C. Cook Nuclear Plant, Units Nos. 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering the approval of a procedure for the disposal of contaminated concrete at the Donald C. Cook Nuclear Plant, pursuant to 10 CFR 20.302, as requested by Indiana Michigan Power Company (the licensee). D.C. Cook Nuclear Plant is located in Berrien County, Michigan.

Environmental Assessment

Identification of Proposed Action

The proposed action would approve the onsite disposal of contaminated concrete resulting from the replacement of the steam generators in D.C. Cook Unit No. 2.

The Need for the Proposed Action

To provide access for complete replacement of the four steam generator lower assemblies, a large opening will be cut in each of the reinforced concrete doghouses surrounding the steam generators. Large sections of reinforced concrete will need to be removed from the Unit 2 steam generator doghouse enclosures and must be disposed of. The licensee proposes to decontaminate the concrete to the extent practical. Following decontamination of the concrete, the licensee intends to dispose of the concrete outside the protected area fence, but within the D.C. Cook Nuclear Plant site boundary. The chosen site is presently the site of concrete spoils and other construction remnants left from the construction of the plant.

Environmental Impacts of the Proposed Action

By letter dated February 29, 1988 the licensee submitted an application for the onsite disposal of contaminated concrete slabs, a licensed material not previously considered by the Commission's staff in the D.C. Cook Final Environmental Statement (FES) dated August 1973. The application, prepared in accordance with 10 CFR 20.302(a), contains a detailed description of the licensed material, thoroughly analyzes and evaluates the information pertinent to the effects on the environment of the disposal of the licensed material, and commits the licensee to follow specific procedures to minimize the risk of unexpected or hazardous exposure.

The proposed action would allow the licensee to retain contaminated concrete on site at the D.C. Cook Nuclear Plant. Large sections of reinforced concrete will be removed from the D. C. Cook Unit No. 2 steam generator doghouse enclosures and must be disposed of. Decontamination by mechanical removal of paint, and surface concrete to a depth of 1/16", will eliminate the majority of the contamination accumulated in the concrete. However, the concrete sections will have trace quantities of Cobalt-60 (Co-60), Cesium-134 (Cs-134), and Cesium-137 (Cs-137) distributed in the remaining outer surfaces. The concrete will be removed in 24 to 30 large slabs ranging in weight from 25 to 70 tons each. It is planned to dispose of the material in this form, as large structural segments. The roof sections are three feet thick, and the wall portions are two feet thick. The estimated total weight of the slabs is 920 tons. This total includes an estimated 65 tons of reinforcing steel and steel structural supports.

The outer surfaces of the doghouse structures are in the upper containment volume. The surfaces were painted with nuclear Grade I paint prior to operation of the unit. However, the airborne contamination inside containment, arising due to normal operations, has brought small amounts of radioactive contamination into contact with the surfaces. Over the ten years of plant operation, the small amounts of contamination have diffused through the paint and into the outer layer of concrete. Inside the doghouse structure, airborne contamination again has contributed to the deposition of radioactivity on the walls.

Radiological analysis was performed on samples of paint and underlying concrete from the outside wall of the doghouse structures. Three nuclides were found in the concrete: Cobalt-60, Cesium-134, and Cesium-137. The average of the measured sample concentration of each nuclide is given in the licensee's application and is shown below in Table 1. The licensee indicated in the application that the concentrations represent the activity expected in the surface of the concrete when it is disposed of after decontamination. The licensee used maximum measured sample concentration in portions of the radiological impact assessment to insure conservatism in the calculations, and these values are summarized in Table 1 also.

To calculate the total activity present in the concrete, the licensee's estimate was made, based on the sample data, of the amount of diffusion of the radionuclides into the concrete. Diffusion is a physical phenomena generally applied to gaseous and liquid materials 'migrating' into a host material. The amount of diffusion of one material into another is dependent on the properties of both materials, the tempreature, and the concentration of the diffusing material at the surface of contact. Water evaporating into air is an example of diffusion. The process of diffusion for the subject concrete was modeled mathematically according to Fick's Law which is a natural exponental function. The concentration of the diffusing material (i.e., the radioiosotopes) at the contact surface migrates into the host material, here being concrete, and gradually decreases with depth from the surface. The mathematical model never reaches zero concentration due to the properties of exponential functions, therefore practically, one chooses a very small cut off point at which it can be assumed the concentration has essentially reached zero. The licensee chose the cut off in this case to be the depth at which the surface activity concentration was decreased by 100,000 times. Actual activity at this level would be impossible to measure and is several times below natural background levels of radiation. This depth was calculated to be approximately one inch. To be more conservative, the licensee assumed that all of the calculated activity in the one inch of concrete was uniformly near the surface. Based on this conservative assumption it would be contained in the first one-tenth of an inch. This assumption was used in the exposure pathway dose calculations. The licensee calculated the total activity by integrating the concentration to this depth over the entire surface area of the concrete blocks.

The licensee indicated in the application that several conservative assumptions were made in calculating the total activity content of the concrete. First, the surface area was calculated based on total volume of concrete and a uniform thickness of two feet. This effectively creates approximately 25 percent more potentially contaminated surface area than actually exists. Second, all surfaces were assumed to be equally contaminated. Due to the presence of the protective steel liner plate, any contamination on the inner concrete surface is expected to be small relative to that measured on the outer surface. Table 1 indicates the licensee's total calculated activity of each radionuclide based on both the average of the sample concentrations and on the maximum concentrations measured in the surface.

TABLE 1.—RADIOACTIVITY CONTENT OF THE DOGHOUSE CONCRETE

Nuclide	Half-life (years)	Ave. conc. (pCi/gm)	Max. conc. (pCi/Gm)	Ave. based activity (uCi)	Max. based activity (uCo)
Co-60	5.3	1.33	2.70	7.8	16.0
Cs–134	2.1	0.33	0.70	1.9	4.1
Cs–137	30.0	2.60	7.70	15.4	45.6
Total		4.26	11.10	25.1	65.7

Prior to disposal, items embedded in the concrete such as equipment supports, anchor bolts, and conduit and piping restraints shall be cut off flush with the concrete surface. The painted surface of the concrete will be removed to a minimum depth of 1/16" into the underlying concrete by a mechanical scarifying process.

The decontaminated blocks will again be surveyed prior to release for disposal. Any areas on the blocks which do not meet radiation protection release criteria, or exceed the assumptions made in the radiation dose evaluation of the application, will be further decontaminated prior to release for disposal.

The proposed disposal method for the concrete blocks is to remove them to an area outside the protected area fence, but within the Donald C. Cook Nuclear Plant site boundary. The Cook Nuclear Plant is located in Lake Township, Berrien County, Michigan, approximately 11 miles South-Southwest of the center of Benton Harbor, Michigan. The plant site consists of approximately 650 acres situated along the eastern shore of Lake Michigan. A more detailed description of the plant site area can be found in the "Final Environmental Statement Related to Operation of Donald C. Cook Nuclear Plant Units 1 and 2" (FES), August 1973.

The chosen site is presently the site of concrete spoils and other construction remnants left from the construction of the plant. The site is more than 200 yards away from any area occupied by plant personnel on any regular basis, and is 150 yards away from Thornton Road. The site is also surrounded by earthern mounds on all sides, with the exception of the access point.

Once the concrete is in place, it will not be visible except at the access point. It has not yet been determined whether or not the slabs will be stacked or individually laid down, but the maximum actual area occupied by the blocks will be less than 20 x 25 yards.

An evaluation of the potential radioactive dose to a plant site worker and to a member of the general public was performed by the licensee to determine the radiological impact of placing the concrete in the proposed location. The calculations were performed using applicable methodologies in Regulatory Guide 1.109, NUREG/CR-3332, and *Introduction to Health Physics*, Cember.

The licensee, in the application, stated all potential exposure pathways recommended by Regulatory Guide 1.109 were evaluated with the exception of potential dose from incineration of the waste. There is no feasible scenario by which the concrete would be burned. The licensee's evaluation consisted of a determination of the environmental pathways through which radiological exposure could be expected to occur and an evaluation of the radiological consequences of the disposal of the concrete for each of the pathways considered. The following environmental pathways were considered:

(1) External exposure from the concrete—occupational and intruder

(2) Internal exposure due to release of contaminants to surface and ground water—ingestion of drinking water, fish and other aquatic foods, and well water

(3) Internal exposure due to agricultural activities on the disposal site following loss of institutional control—ingestion of vegetables, meat and dairy products

(4) Internal exposure due to inhalation of resuspended contaminated concrete dusts—occupation, and intruder following loss of institutional control.

This evaluation demonstrates that any doses to occupational workers, intruders, and members of the general public would be very small, and far lower than the levels permitted for unrestricted areas by 120 CFR 20.105.

In the FES for the operation of D.C. Cook, the Commissioner's staff considered the potential effects on the environment of licensed material from operation of the plant and, in the summary of radiological impacts, concluded that "* * * the routine operation of the Cook Station is expected to add only a small increment to the natural background dose." ". . . these doses correspond to concentrations which are a small percentage of permissible standareds set forth in 10 CFR Part 20.

Since the disposal proposed in the licensee's application dated February 29, 1988, involves licensed materials containing much less than 0.1 percent of the radioactivity, primarily Cobalt-60, Cesium-134, and Cesium-137, already considered acceptable in the FES, and involve exposure pathways much less significant and radiochemical forms much less mobile than those considered in the FES, the Commisson's staff considers this site-specific application for the D.C. Cook Nuclear plant to have insignificant radiological impact. The Commission's staff accepts the evaluations of the licensee documented in Attachment 1 of the February 29, 1988, application as further assurance that the proposed disposal procedures will have a negligible effect on the environment and on the general population in comparison to normal background radiation.

Alternatives to the Proposed Action

An alternative to on-site burial would be to ship and dispose of the concrete slabs at an offsite licensed disposal site. The overall benefit from the proposed method for the disposal of these slightly contaminated concrete slabs will be cost saving of approximately $1.6 million and a saving of burial site space of approximately 16,000 cubic feet, which can be used for other radwaste of higher activity. The alternative would not be environmentally preferable.

Alternative Use of Resources

This action involves no use of resources not previously considered in connection with the "Final Environmental Statement Related to Operation of Donald C. Cook Nuclear Plan Units 1 and 2" dated August 1973.

Agencies and Persons Consulted

The Commission's staff reviewed the licensee's request and did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed action.

Based upon the foregoing environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the application dated February 29, 1988, which is available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, DC, and at the Maude Preston Palenski Memorial Library, 500 Market Street, St. Joseph, Michigan 49085.

Dated at Rockville, Maryland, this 23rd day of August 1988.

For the Nuclear Regulatory Commission.

Martin J. Virgilio,

Director, Project Directorate III-1, Division of Reactor Projects—III, IV, V & Special Projects.

[FR Doc. 88-19676 Filed 8-29-88; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301-55]

Unfair Trade Practices; Icicle Seafoods; USTR Determination

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of Proposed Determination and Action Under Section 301.

SUMMARY: Pursuant to 19 U.S.C. 2414, as amended by section 1301 of the Omnibus Trade and Competitiveness Act of 1988, the United States Trade and Competitiveness Act of 1988, the United States Trade Representative is required to determine whether United States rights under a trade agreement are being denied by Canada's prohibition on the export of unprocessed Pacific herring and pink and sockeye salmon. The Trade Representative is also considering any appropriate action (subject to the Specific direction, if any, of the President) in response to Canada's practice. The USTR welcomes comments regarding such determination or responsive action with respect to current or anticipated Canadain measures.

DATE: Written comments will be accepted through Sept. 30, 1988.

ADDRESS: Comments should be addressed to the Chairman, Section 301 Committee, Office of the United States Trade Representative, Room 223, 600 17th St., NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Les Glad, Economist, Office of the United States Trade Representative, (202) 395-3077.

SUPPLEMENTARY INFORMATION: On April 1, 1986, Icicle Seafoods and nine other companies with fish processing facilities in Washington or southeastern Alaska filed a petition under section 301 of the Trade Act of 1974, as amended (19 U.S.C. 2411, et seq.) alleging that Canada prohibits exports of unprocessed Pacific herring and pink and sockeye salmon, and that this policy is an unjustifiable trade practice which violates Article XI of the General Agreement on Tariffs and Trade (GATT). Article XI prohibits most types of export restrictions.

On May 16, 1986, pursuant to 19 U.S.C. 2412(a), the Trade Representative initiated an investigation on the basis of this petition (51 FR 19,648). Also on May 16, the Trade Representative requested bilateral consultations with representatives of the government of Canada.

These consultations were held on Sept. 3 and Oct. 27, 1986. They failed to yield a satisfactory resolution of the issue. The USTR therefore invoked the formal dispute settlement procedures of the GATT and won a favorable decision that was adopted by the GATT Council in March 1988.

Representatives of the United States and Canada again consulted bilaterally on March 9–11, 1988. On March 22, 1988, the government of Canada announced that it would eliminate the export restrictions effective Jan. 1, 1989. However, the government of Canada also announced that it will immediately replace these export restrictions with new landing and inspection requirements prior to export. The requirement will apply to exports of the species of fish at issue in the GATT case, and might also be imposed on other species.

Pursuant to 19 U.S.C. 2414, as amended by section 1301 of the Omnibus Trade and Competitiveness Act of 1988, the USTR is required to determine whether Canada's export restrictions deny "rights to which the United States is entitled" under the GATT. If this determination is affirmative, he is further required to take appropriate and feasible action in response (subject to the specific direction, if any, of the President) unless a specified exception applies.

The USTR welcomes comments regarding such determination and responsive action. USTR is particularly interested in comments on the current economic effects of Canada's export restrictions, and on the effects of a new Canadian landing requirement, as applied to: (a) Pacific herring; (b) pink and sockeye salmon; (c) chum, coho, and chinook salmon; and/or (d) Pacific groundfish. Comments should address the probable impact of alternative landing requirements such as those involving: off-loading and inspection in a Canadian port; or transfer of a "fish ticket" from a vessel to Canadian authorities in a Canadian port, without off-loading; or transfer of fish from a Canadian fishing vessel to a tender vessel in Canadian waters. USTR additionally invites comments on the economic impact on U.S. processors of Canadian quality inspection of unprocessed fish before export, and on the utility or necessity of such a program in promoting the quality of U.S.-processed fish products. USTR also invites comments on appropriate U.S. responses to alternative Canadian landing and/or inspection requirements.

Comments should be filed in accordance with the regulations in 15 CFR 2006.8 and are due no later than Sept. 30.

Judith H. Bello,

General Counsel, Chairman, Section 301 Committee.

[FR Doc. 88–19650 Filed 8–29–88; 8:45 am]

BILLING CODE 3190-01-M

Generalized System of Preferences (GSP); Review of Country Practice Petitions and Public Hearings

Summary: The purpose of this notice on the GSP annual review is (1) to announce the acceptance for review of petitions to modify the status of countries as GSP beneficiary countries in regard to their practices as specified in 15 CFR 2007.0(b) and (2) to announce the timetable for public hearings to consider petitions accepted for review.

I. Acceptance of Country Practice Petitions for Review

Notice is hereby given of acceptance for review of country practice petitions requesting modification in the status of countries presently designated as GSP beneficiary countries, as provided for in Title V of the Trade Act of 1974 (the Act) (19 U.S.C. 2461–2465). These petitions were submitted, and will be reviewed, pursuant to regulations codified at 15 CFR part 2007.

Acceptance for review of the petitions listed herein does not indicate any opinion with respect to a disposition on the merits of the petitions. Acceptance indicates only that the listed petitions have been found to be eligible for review by the GSP Subcommittee and the Trade Policy Staff Committee (TPSC), and that such review will take place.

1. Information Subject to Public Inspection

Information submitted in connection with the hearings will be subject to public inspection by appointment with the staff of the GSP Information Center, except for information granted "business confidential" status pursuant to 15 CFR 2003.6 and 15 CFR 2007.7. Briefs or statements must be submitted in twenty copies in English. If the document contains business confidential information, twenty copies of a nonconfidential version of the submission along with twelve copies of the confidential version must be submitted. In addition, the document containing confidential information should be clearly marked "confidential" at the top and bottom of each and every page of the document. The version that does not contain business confidential information (the public version) should also be clearly market at the top and bottom of each and every page (either "public version" or nonconfidential")

2. Communications

All communications with regard to these hearings should be addressed to: GSP Subcommittee, Office of the United States Trade Representative, 600 17th Street, NW., Room 517, Washington, DC 20506. The telephone number of the Secretary of the GSP Subcommittee is (202) 395–6971. Questions may be directed to any member of the staff of the GSP Information Center.

II. Deadline for Receipt of Requests To Participate in the Public Hearings

The GSP Subcommittee of the TPSC invites submissions in support of or in opposition to any petition listed in this notice. All such submissions should conform to 15 CFR 2007, particularly §§ 2007.0, 2007.1(a)(1), 2007.1(a)(2), and 2007.1(a)(3).

Hearings will be held on October 3–5 beginning at 10:00 a.m. in the Commerce Department auditorium, 14th and Constitution Avenue, NW., Washington, DC. The hearings will be open to the public and a trascript of the hearings will be made available for public inspection or can be purchased from the reporting company.

Requests to present oral testimony at the public hearings should be accompanied by twenty copies, in English, of all written briefs or statements and should be received by the Chairman of the GSP Subcommitte no later than the close of business Monday, September 19. Oral testimony before the GSP Subcommittee will be limited to five minute presentations that summarize or supplement information contained in briefs or statements submited for the record. Post-hearing briefs or statements will be accepted if submitted in twenty copies, in English, no later than close of business Monday, October 24. Rebutal briefs should be submitted in twenty copies, in English, by close of business Monday, November 21.

Parties not wishing to appear may submit written briefs or statements in twenty copies, in English, in connection with countries under consideration in the public hearings, provided that such submissions are filed by Wednesday, October 26 and conform with the regulations cited above.

III. Cases Accepted for Review Regarding Country Practices, Pursuant to 15 CFR 2007.0(b)

Pursuant to 15 CFR 2007.0(b), the TPSC has accepted for review petitions to review the status of Burma, Haiti, Israel,[1] Liberia, Malaysia, and Syria as GSP beneficiary countries in relation to their practices relating to worker rights.

In veiw of the fact that a review of the Central African Republic's eligibility in relation to its practices with respect to worker rights is already in progress, and that Paraguay and Chile have been indefinitely suspended from the GSP list of beneficiary countries, comments on the worker rights practices of these three countries will also be welcomed during the public hearing and comment process described in section II. In addition, since the review of Thailand's practices with regard to intellectual property rights has been extended to December 15, 1988, comments will also be welcomed on this issue.

Pursuant to 15 CFR 2007.0(b), the TPSC has accepted for review a request filed by Occidental Petroleum Corporation to review Venezuela's status as a GSP beneficiary country in relation to its practices regarding the expropriation of Occidental's property without providing compensation.

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[1] The present decision to accept review of Israeli worker rights practices is without prejudice to the U.S. Government's ultimate position on whether the West Bank and Gaza should be deemed part of the "country of" Israel for purposes of section 502(b)(8). The United States has consistently refrained from any action that would have the effect of recognizing, either impliedly or expressly, the de jure incorporation of the occupied territories into Israel.

Sandra J. Krostoff,

Chairwoman, Trade Policy Staff Committee.

[FR Doc. 88-19730 Filed 8-29-88; 8:45 am]

BILLING CODE 3190-01-M

PROSPECTIVE PAYMENT ASSESSMENT COMMISSION

Meeting

Notice is hereby given of meetings of the Prospective Payment Assessment Commission on Tuesday and Wednesday, September 13–14, 1988, at the Omni Shoreham Hotel, 2500 Calvert Street, Northwest, Washington, D.C.

The Subcommittee on Diagnostic and Therapeutic Practices will be meeting in the Ambassador Room at 9:00 a.m., September 13, 1988. The Subcommittee on Hospital Productivity and Cost-Effectiveness will convene its meeting at 9:00 a.m. in the Diplomat Room on September 13, 1988.

The Full Commission will convene at 3:00 p.m. on September 13, 1988, in the Diplomat Room. The Commission will meet the following day at 9:00 a.m. in the Diplomat Room where a panel will provide expertise on particular aspects of the Medicare Cost Report and to better understand the implications of using these data for policy purposes.

Donald A. Young,

Executive Director.

[FR Doc. 88-19844 Filed 8-29-88; 8:45 am]

BILLING CODE 6820-BW-M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. 34-26024; File No. 600-24]

Self-Regulatory Organizations; Delta Government Options Corp.; Application for Registration as a Clearing Agency; Extension of Time for Submission of Comments

On July 29, 1988, Delta Government Options Corporation ("Delta") files with the Commission an application for full registration as a clearing ageny under Section 17A of the Securities Exchange Act of 1934, 15 U.S.C. 78q-1 ("Act"). On August 5, 1988, the Commission published in the **Federal Register** notice of Delta's filing and invited commentators to submit, on or before August 26, 1988, written data, views and arguments ("comments") concerning that application.[1]

Several potential commentators have requested an extension of the time period for submitting comments concerning Delta's application for registration and Delta's requests for exemption from various requirements of section 17A of the Act. Accordingly, the Commission has determined to extend the time for submission of comments to September 9, 1988. All comments received on or before September 9, 1988, will be considered by the Commission in deciding whether to approve Delta's application and grant Delta's exemption requests. Persons desiring to make written submissions should file six copies thereof with the Secretary of the Commission, 450 5th Street, NW., Washington, DC 20549. Reference should be made to File No. 600-24. Copies of the application and of all written comments will be available for inspection at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington DC.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: August 24, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-19698 Filed 8-29-88; 8:45 am]

BILLING CODE 8010-01-M

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[1] Securities Exchange Act Rel. No. 25956 (August 1, 1988), 53 FR 29538.

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area #6648]

New York; Declaration of Disaster Loan Area

The City of Rome, New York, constitutes an Economic Injury Disaster Loan Area as a result of damages from a fire which occurred on July 4, 1988 at the Price Chopper Mall. Eligible small businesses without credit available elsewhere and small agricultural cooperatives without credit available elsewhere may file applications for economic injury assistance until the close of business on May 19, 1989 at the address listed below: Disaster Area 1 Office, Small Business Administration, 15-01 Broadway, Fairlawn, NJ 07410.

Or other locally announced locations. The interest rate for eligible small business concerns without credit available elsewhere is 4 percent and 9 percent for eligible small agricultural cooperatives without credit available elsewhere.

(Catalog of Federal Domestic Assistance Program No. 59002.)

Date: August 19, 1988.

James Abdnor,

Administrator.

[FR Doc. 88-19646 Filed 8-29-88; 8:45 am]

BILLING CODE 8025-01-M

[Application No. 02/02-0518]

Magazine Partners, Inc.; Application for License To Operate as a Small Business Investment Company

An Application for a License to operate a small business investment company (SBIC) under the provisions of the Small Business Investment Act of 1958, as amended (Act) (15 U.S.C. 661 *et seq.*) has been filed by Magazine Partners, Inc., 457 North Harrison Street, P.O. Box 1155, Princeton, New Jersey 08540, with the Small Business Administration (SBA) pursuant to 13 CFR 107.102 (1988).

The proposed officers, directors, and owners of Magazine Partners, Inc. are as follows:

Name and address	Position	Percentage of ownership
William R. Robins, 696 Kingston Road, Princeton, NJ 08540.	President, Treasurer, Director, and Manager.	0
Paul H. DeCoster, 450 West End Avenue, New York, New York 10024.	Secretary and Director.	0
Nancy Hood Robins, 696 Kingston Road, Princeton, NJ 08540.	Director	100% (indirectly).
Magazine Funding, Inc., 457 North Harrison St., Princeton, NJ 08540.		100%.

Magazine Funding, Inc. (MFI), is wholly owned by Bleak House, Inc. 457 North Harrison St., Princeton, NJ 08540. Bleak House, Inc. is controlled by Nancy Hood Robins.

The Applicant will begin operations with a capitalization of $1,000,000 and will be a source of equity capital and long-term loan funds for qualified small business concerns. Its target client group is small, established, privately-held companies, speciality magazines, newsletters, and periodicals. The Applicant intends to conduct its business in the State of New Jersey and other states throughout the nation.

Matters involved in SBA's consideration of the Application include the general business reputation and character of the proposed owner and management, and the probability of successful operations of the Applicant under their management including profitability and financial soundness, in accordance with the Act and Regulations.

Notice is hereby given that any person may, no later than 30 days from the date of publication of this Notice, submit written comments on the proposed Applicant. Any such communication should be addressed to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 L Street, NW., Washington, DC 20416.

A copy of the Notice will be published in a newspaper of general circulation in Princeton, New Jersey.

(Catalog of Federal Domestic Assistance Program no. 59.011, Small Business Investment Companies)

Dated: August 24, 1988.

Robert G. Lineberry,

Deputy Associate Administrator for Investment.

[FR Doc. 88-19643 Filed 8-29-88; 8:45 am]

BILLING CODE 8025-01-M

Region VII Advisory Council Meeting; Public Meeting; Iowa

The U.S. Small Business Administration Region VII Advisory Council, located in the geographical area of Des Moines, will hold a public meeting at 7:00 p.m. on Sunday, October 2, 1988, at the Scheman Center, Iowa State University campus, Ames, Iowa to meet jointly with the Advisory Councils for the Iowa Department of Economic Development and the Iowa Small Business Development Centers to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Conrad Lawlor, District Director, U.S. Small Business Administration, 210 Walnut Street, Seventh Floor, Des Moines, Iowa 50309, (515) 284-4422.

Jean M. Nowak,

Director, Office of Advisory Councils.

August 22, 1988.

[FR Doc. 88-19645 Filed 8-29-88; 8:45 am]

BILLING CODE 8025-01-M

Region VIII Advisory Council Meeting Public Meeting; Montana

The U.S. Small Business Administration Region VIII Advisory Council, located in the geographical area of Helena, will hold a public meeting at 8:30 a.m. on Friday, October 21, 1988, at the Ponderosa Inn, Executive Suite 406, 220 Central Avenue, Great Falls, Montana, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call John R. Cronholm, District Director, U.S. Small Business Administration, Federal Office Building, 301 South Park, Drawer 10054, Helena, Montana 59626-(406) 449-5381.

Donald Clarey,

Deputy Administrator.

August 23, 1988.

[FR Doc. 88-19644, Filed 8-29-88; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD-88-073]

National Boating Safety Advisory Council Subcommittee on Propeller Guards; Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 1), notice is hereby given of a meeting of the National Boating Safety advisory Council's Subcommittee on Propeller Guards to be held on Thursday and Friday, September 22 and 23, 1988, at the Boston Whaler Company, 1149 Hingham Street, Rockland, Massachusetts, beginning at 8:30 a.m. on both days and ending at 5:00 p.m. on Thursday and at 12:00 noon on Friday. The agenda for the meeting will be as follows:

1. To discuss the issue of propeller guards on recreational watercraft relating to personal safety and performance factors.

The meeting is open to the public. Persons wishing to present oral statements at the meeting should so notify the Executive Director of the Council no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Captain W.S. Griswold, Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard, (G-NAB), Washington, DC 20593-0001, or by calling (202) 267-0997.

Dated: August 19, 1988.

Robert T. Nelson,

Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 88-19599 Filed 8-29-88; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Dated: August 24, 1988.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub.L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-0089.

Form Number: 1040NR.

Type of Review: Revision.

Title: U.S. Nonresident Alien Income Tax Return.

Description: This form is used by nonresident alien individuals and foreign estates and trusts to report their income subject to tax and compute the correct tax liability. The information on the return is used to determine whether income, deductions, credits, payments, etc., are correctly figured. Affected public are nonresident alien individuals, estates, and trusts.

Respondents: Individuals or households, Farms, Businesses or other for-profit, Small businesses or organizations.

Estimated Number of Respondents: 180,000.

Estimated Burden Hours Per Response: 6 hours.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 1,111,379 hours.

Clearance Officer: Garrick Shear, (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf, (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 88-19603 Filed 8-29-88; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Dated: August 24, 1988.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: New.
Form Number: None.
Type of Review: New Collection.
Title: Customer Survey on IRS Tax Publications.
Description: The information we get will help us identify who our customers are and how we can better meet their needs. It will point us to possible problem areas in certain publications. We can then produce a more understandable publication that will reduce the burden on taxpayers and help them comply with the tax laws. The random sample will come from taxpayers requesting the targeted publication(s).
Respondents: Individuals or households.
Estimated Number of Respondents: 2,302.
Estimated Burden Hours Per Response: 6 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 230 hours.
Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports, Management Officer.

[FR Doc. 88-19604 Filed 8-29-88; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Dated: August 24, 1988.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Office, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue, NW., Washington, DC 20220.

U.S. Customs Service

OMB Number: 1515-0113.
Form Number: CF 1002.
Type of Review: Extension.
Title: Certificate of Payment of Tonnage Tax.
Description: The Certificate of Payment of Tonnage Tax is generated by U.S. Customs upon payment of tonnage tax and light money by the master of the vessel. It is presented to Customs upon each entry of the vessel during the tonnage year to ensure against overpayment of tonnage taxes.
Respondents: Businesses or other for-profit.
Estimated Number of Recordkeepers: 233,839.
Estimated Burden Hours Per Recordkeeper: 3 minutes.
Frequency of Response: On occasion.
Estimated Total Recordkeep Burden: 11,692 hours.
Clearance Officer: B. J. Simpson (202) 566-7529, U.S. Customs Service, Room 6426, 1301 Constitution Avenue, NW., Washington, DC 20229.
OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports, Management Officer.

[FR Doc. 88-19605 Filed 8-29-88; 8:45 am]

BILLING CODE 4810-25-M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Determination; Art of Paolo Veronese 1518-1588

Notice is hereby given of the following determination: Pursuant to the authority versted in me by the act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85-5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "The Art of Paolo Veronese 1518-1588" (see list [1]) imported from abroad for the temporary exhibition without profit within the United States are of cultural significance. These objects are imported pursuant to loan agreements with the foreign lenders. I also detemine that the temporary exhibition or display of the listed exhibit objects at the National Gallery of Art in Washington, DC, beginning on or about November 13, 1988, to on or about February 20, 1989, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register.**

R. Wallace Stuart,
Acting General Counsel.

Date: August 24, 1988.

[FR Doc. 88-19659 Filed 8-29-88; 8:45 am]

BILLING CODE 8230-01-M

Culturally Significant Objects Imported for Exhibition; Determination; Michelangelo: Draftsman, Architect

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85-5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "Michelangelo: Draftsman, Architect" (see list [1]) imported from abroad for the temporary exhibition without profit within the United States are of cultural significance. These objects are imported pursuant to loan agreements with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the National Gallery of Art, in Washington, DC, beginning on or about October 9, 1988, to on or about December 11, 1988, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register.**

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[1] A copy of this list may be obtained by contacting Mr. R. Wallace Stuart of the Office of the General Counsel of USIA. The telephone number is 202-485-7986, and the address is Room 700, U.S. Information Agency, 301 4th Street SW., Washington, DC 20547.

[1] A copy of this list may be obtained by contacting Mr. R. Wallace Stuart of the Office of the General Counsel of USIA. The telephone number is 202-485-7986, and the address is Room 700, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547.

Date: August 24, 1988.

R. Wallace Stuart,

Acting General Counsel.

[FR Doc. 88–19658 Filed 8–29–88; 8:45 am]

BILLING CODE 8230-01-M

Culturally Significant Objects Imported for Exhibition; Determination; Pastoral Landscape: The Legacy of Venice et al.

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "The Pastoral Landscape: The Legacy of Venice (at the Gallery); and The Pastoral Landscape: The Modern Vision (at The Phillips Collection)" (see list [1]) imported from abroad for the temporary exhibition without profit within the United States are of cultural significance. These objects are imported pursuant to loan agreements with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the National Gallery of Art and at the Phillips Collection in Washington, DC, beginning on or about November 6, 1988, to on or about January 22, 1989, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register**.

Date: August 24, 1988.

R. Wallace Stuart,

Acting General Counsel.

[FR Doc. 88–19660 Filed 8–29–88; 8:45 am]

BILLING CODE 8230-01-M

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[1] A copy of this list may be obtained by contacting Mr. R. Wallace Stuart of the Office of the General Counsel of USIA. The telephone number is 202–485–7988, and the address is Room 700, U.S. Information Agency, 301 4th Street SW., Washington, DC 20547.

Culturally Significant Objects Imported For Exhibition; Determination; Tuscan Drawings

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit "Tuscan Drawings of the Sixteenth Century from the Uffizi: Fra Bartolommeo to Cigoli" (see list [1]), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. I also determine that the temporary exhibition or display of the listed exhibit objects at the Detroit Institute of Arts, beginning on or about October 16, 1988 to on or about January 8, 1989, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register**.

Date: August 19, 1988.

R. Wallace Stuart,

Acting General Counsel.

[FR Doc. 88–19657 Filed 8–29–88; 8:45 am]

BILLING CODE 8230-01-M

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[1] A copy of this list may be obtained by contacting Ms. Lorie Nierenberg of the Office of the General Counsel of USIA. The telephone number is (202) 485–8627, and the address is Room 700, U.S. Information Agency, 301–4th Street, SW., Washington, DC 20547.

Meeting of the Book and Library Advisory Committee

A meeting of the Book and Library Advisory Committee will take place on September 19, 1988, at 301 Fourth Street SW., Room 849, Washington, DC, from 10:00 a.m. to 12:00 noon.

The committee will be discussing various ongoing international book and library programs.

Please contact Louise Wheeler on (202) 485–8889 for further information.

Dated: August 24, 1988.

Charles N. Canestro,

Committee Management Officer.

[FR Doc. 88–19663 Filed 8–29–88; 8:45 am]

BILLING CODE 8230-01-M

United States Advisory Commission on Public Diplomacy; Meeting

A meeting of the U.S. Advisory Commission on Public Diplomacy will be held September 14, 1988 at the Voice of America, 330 Independence Avenue, SW., Washington, DC from 9:30 a.m. to 11:30 p.m.

The Commission will meet at the Voice of America for a tour of VOA's Master Control and renovated studios, and to observe VOA's multilingual text processing system. The Commission will meet with VOA Director Richard Carlson and VOA Deputy Director Bob Barry to discuss VOA Modernization.

Please call Gloria Kalamets, (202) 485–2468, if you are interested in attending the meeting since space is limited and entrance to the building is controlled.

Dated: August 23, 1988.

Charles N. Canestro,

Management Analyst, Federal Register Liaison.

[FR Doc. 88–19662 Filed 8–29–88; 8:45 am]

BILLING CODE 8230-01-M

Meeting of the Voice of America Broadcast Advisory Committee

A meeting of the Voice of America Broadcast Advisory Committee has been scheduled for September 14, 1988, in Room 3300, 330 Independence Avenue SW., Washington, DC, from 12:00 noon to 2:30 p.m.

Matters to be discussed are:

(1) New program initiatives;

(2) Impact of budget on VOA operations;

(3) Status of VOA modernization;

(4) Progress of studio renovation;

(5) Future purpose and role of the committee.

Please contact Louise Wheeler on (202) 485–8889 for further information.

Dated: August 24, 1988.

Charles N. Canestro,

Committee Management Officer.

[FR Doc. 88–19661 Filed 8–29–88; 8:45 am]

BILLING CODE 8230-01-M

Sunshine Act Meetings

Federal Register

Vol. 53, No. 168

Tuesday, August 30, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL COMMUNICATIONS COMMISSION

August 25, 1988–G.

FCC To Hold Open Commission Meeting, Thursday, September 1, 1988

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, September 1, 1988, which is scheduled to commence at 9:30 a.m., in Room 856, at 1919 M Street, NW., Washington, DC.

Agenda, Item No., and Subject

Mass Media—1—Title: In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service; Review of Technical and Operational Requirements: Part 73–E, Television Broadcast Stations; Reevaluation of the UHF Television Channel and Distance Separation Requirements of Part 73 of the Commission's Rules. Summary: The Commission will consider further action in this proceeidng on the technical, economic, legal, and policy issues relating to authorizing and establishing an advanced television system for terrestrial broadcasting.

This meeting may be continued the following work day to allow the Commission to complete appropriate action.

Additional information concerning this meeting may be obtained from Sarah Lawrence, Office of Public Affairs, telephone number (202) 632–5050.

Issue date: August 25, 1988.

Federal Communications Commission.

H. Walker Feaster, III,

Acting Secretary.

[FR Doc. 88–19838 Filed 8–26–88; 3:13 pm]

BILLING CODE 6712-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of August 29, September 5, 12, and 19, 1988.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of August 29

There are no meetings scheduled for the Week of August 29.

Week of September 5—Tentative

Wednesday, September 7

10:00 a.m.
Briefing on Proposed Rule on Degreed Operators (Public Meeting)

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Thursday, September 8

2:00 p.m.
Briefing on Final Rule on Emergency Planning and Preparedness Requirements for Nuclear Power Plant Fuel Loading and Initial Low Power Operations (Public Meeting)

Week of September 12—Tentative

Monday, September 12

2:00 p.m.
Briefing on Severe Accident Policy for Future Light Water Reactors (Public Meeting)

Friday, September 16

10:00 a.m.
Briefing by Health Physics Society on Below Regulatory Concern Issues (Public Meeting) (Tentative)

10:15 a.m.
Briefing on Policy Paper on Radiation Risks Which are Below Regulatory Concern (Public Meeting)

11:45 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of September 19—Tentative

There are no meetings scheduled for the Week of September 19.

ADDITIONAL INFORMATION: Affirmation of "Interim Rule for Collection of Required Fees Mandated by Congress (Public Law 100–203)" (Public Meeting) was held on August 5.

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING)—(301) 492–0292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 492–1661.

August 25, 1988.

Andrew L. Bates,

Office of the Secretary.

[FR Doc. 88–19823 Filed 8–26–88; 3:18 pm]

BILLING CODE 7590-01-M

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federal register

Tuesday
August 30, 1988

Part II

Department of Housing and Urban Development

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Parts 904, 905, 913, 960, and 966

Tenancy and Administrative Grievance Procedure for Public Housing; Tenancy and Administrative Grievance Procedure; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Parts 904, 905, 913, 960 and 966

[Docket No. R-88-1020; FR-1164]

Tenancy and Administrative Grievance Procedure for Public Housing; Public Housing—Tenancy and Administrative Grievance Procedure

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends lease and grievance procedures for the public housing program under the United States Housing Act of 1937 and complies with Section 204 of the Housing and Urban Rural Recovery Act of 1983 (Pub. L. 98-181).

HUD revises the public housing rules concerning tenant leases and termination of tenancy, and concerning hearings for applicants and tenants. The rule also states when a public housing agency (PHA) may exclude a grievance relating to termination of tenancy or eviction from the PHA's administrative grievance process.

DATES: Effective Date: Under section 7(o)(3) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(o)(3)), this final rule cannot become effective until after the first period of 30 calendar days of continuous session of Congress which occurs after the date of the rule's publication. HUD will publish a notice of the effective date of this rule following expiration of the 30-session-day waiting period. Whether or not the statutory waiting period has expired, this rule will *not* become effective until HUD's separate notice is published announcing a specific effective date.

FOR FURTHER INFORMATION CONTACT: Edward Whipple, Chief, Rental and Occupancy Branch, Office of Public and Indian Housing, Room 4206, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 426-0744. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

Note.— The rules affected by this rulemaking were previously located in 24 CFR, Chapter VIII, but were moved to Chapter IX (by a final rule published February 23, 1984, 49 FR 6712) because of a reorganization which established the position of Assistant Secretary for Public and Indian Housing. The changes are as follows: Lease and grievance procedure, previously at 24 CFR Part 866, now at Part 966; tenant income and rent, previously at Part 813, now at Part 913; notice and hearing for applicants, previously at Part 860, § 860.207, now at Part 960, § 960.207; Turnkey III Program, previously at Part 804, now at Part 904; Indian Housing Program, previously at Part 805, now at Part 905.

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Preamble

I. Background

A. History of Old Rule

This final rule amends lease and grievance procedures for the public housing program under the United States Housing Act of 1937 (24 CFR Part 966). The lease and grievance procedures state HUD requirements for the lease between a Public Housing Agency ("PHA") and its tenants, and for administrative hearings by the PHA of grievances raised by public housing tenants. In this Preamble, the term "old rule" refers to the lease and grievance regulation in effect before this final rule.

In February 1971, HUD issued circulars with instructions on lease requirements and hearing procedures to all PHAs operating public housing (Circulars RHM 7465.8, "Requirements and Recommendations to be Reflected in Tenant Dwelling Leases to Low-Rent Public Housing Projects", and RHM 7465.9, "Grievance Procedure in Low-Rent Public Housing Projects").

In June 1973, the Department announced "review and evaluation" of the circulars (38 FR 15988). On November 6, 1974, the Department published two proposed rules, one setting forth dwelling lease procedures and requirements, and the other stating grievance procedures and requirements (39 FR 39285, 39287). Following public comment, final rules were published on August 7, 1975, adopting Subparts A and B of 24 CFR Part 866 (40 FR 33402, 33406).

B. History of This Rulemaking

In this rulemaking, HUD published two proposed rules to amend the old lease and grievance procedures. The proposed rules were published in December 1982 and July 1986.

On December 13, 1982 (47 FR 55689), HUD published a first proposed rule to (1) simplify tenant lease requirements, including deletion of existing regulatory requirements for minimum notice of lease termination, (2) limit the requirement for Public Housing Agency (PHA) grievance hearings for tenants to PHA determinations of tenant income or rent, (3) require that evictions be carried out through judicial process and that termination of tenancy must be based on violation of the lease, Federal, State or local law or other good cause.

After publication of the first proposed rule, the Congress enacted section 204 of the Housing and Urban-Rural Recovery Act of 1983 (HURRA) (referred to in this Preamble as the "1983 law"). The 1983 law states new requirements for public housing leases and administrative grievance procedures (Pub. L. 98-181, November 30, 1983, amending section 6 of the U.S. Housing Act of 1937, 42 U.S.C. 1437d(k) and 1437d(1)). The 1983 law is consonant with some aspects of the December 1982 proposed rule, but in other respects severely limits the scope of the regulatory reforms originally proposed by HUD. Section 204 of the 1983 law requires the PHA to establish and implement a tenant grievance procedure for "any proposed adverse public housing agency action", not just a determination of tenant income or rent, and prescribes minimum notice periods for termination of the lease. The legislation allows a PHA to exclude grievances concerning eviction or termination of tenancy from the administrative hearing procedure if HUD determines that local law requires a hearing in court which provides the basic elements of due process before a tenant is evicted.

The Department received extensive public comments on the December 1982 proposed rule, which was published before enactment of the 1983 law. 862 comments were docketed by the HUD Rules Docket Clerk. Comments from legal aid offices and public housing tenants strongly opposed the proposed amendments. Comments from PHAs and the National Association of Housing and Redevelopment Officials were in general strongly in favor of the proposed amendments, although some technical changes were suggested.

Because of the 1983 law, a second proposed rule was published by HUD in July 1986 (51 FR 26504). This rule proposed changes to implement the 1983 law, and also other revisions after consideration of public comment on the original proposed rule. (In this Preamble, "proposed rule" means the July 1986 proposed rule, unless otherwise indicated.)

The Department docketed 87 comments on the July 1986 proposed rule. In general, the direction of public comment is very similar to comment on the initial proposed rule of December 1982. PHAs and PHA organizations support promulgation of the amendments. Comments by the legal aid community, and other comments largely written or inspired by legal aid, vigorously oppose amendment of the old rule.

II. General Character of Rule

The contents of this rule are a historical change in Federal requirements for governance of public housing. The amendments touch every aspect of public housing management, and potentially affect the texture of daily life for the 3.4 million public housing residents.

The new rule removes the burden of Federal regulations which unnecessarily diminish the ability of the 3300 Public Housing Agencies to operate public housing in response to local needs and conditions. At the same time, the regulations faithfully carry out statutory mandates under Federal law.

Later sections of this Preamble describe in detail the reasons for particular changes in the old lease and grievance rule, and the reasons for specific provisions of the new rule. In this section, the Preamble discusses the broad context and impetus of the new rule, and general reasons which support many of the specific changes. The justifications for the regulatory changes in this rule are comprised both of the specific reasons described in the discussion of each particular provision, and the general considerations described in this section.

This rule is the culmination of a major enterprise for the deregulation of public housing, in the context of the national movement for dereguation of unneeded and inefficient Federal controls. On August 12, 1981, the Presidential Task Force on Regulatory Relief, chaired by Vice President Bush, designated the HUD Lease and Grievance Procedures for review. In its announcement, the Task Force commented:

> These rules establish compliance procedures that must be incorporated in leases by local public housing authorities (PHAs) assisted by HUD. Not only do they often duplicate and sometimes exceed State and local ordinances, they tend to make it difficult for PHAs to protect the health and safety of tenants. For example, PHAs claim that disruptive tenants that violate their leases, vandalize housing and prey upon other tenants can avoid for months effective remedial actions by the PHA. Reforming these requirements could benefit tenants, PHAs and deserving families seeking public housing.

In the context of deregulation, the reexamination of existing Federal regulation asks whether existing Federal regulation is required by law, or, if not required by law, whether there is a sufficient positive reason to retain the preexisting regulation. In the case of the old lease and grievance rule, HUD regulatory requirements reach far beyond any obligation of law, including the 1983 law. In HUD's view, there is no adequate justification for retaining much of the detailed regulatory apparatus under the old rule. Conversely, there is excellent reason to believe that features of the old rule have severely interfered with the efficient and effective management of public housing.

This final rule is based on a fresh and comprehensive examination of the regulatory scheme imposed by the old lease and grievance rule. All regulation imposes a cost on the entities which are regulated. The final rule removes regulatory limitations for which there is not now a persuasive positive justification for imposing these costs.

Public comments from the legal aid community protest changes of the various policies embedded in the old rule, and claim that the changes are not substantiated by "new facts". In response, it is important to stress that the relevant factors before HUD in this rulemaking need not turn on the availability of empirical data or "new facts" concerning administration of public housing under the old lease and grievance rule. Rather, the factors properly considered by the Department more characteristically depend on examination of the functions of specific regulatory provisions, and of the allocation of local discretion to the PHAs charged with statutory responsibility for administration of the public housing program.

In this examination, the determination of what regulatory controls should be retained or newly imposed, and in what form, legitimately depends in considerable part on judgments of value, and is not readily reducible to a simple determination of fact, that could be resolved by a study or other data on functioning of PHAs under the old rule. In this rulemaking, HUD's examination is influenced by these broad values:

—That less regulation is better regulation.

—That local control is better than Federal control.

Both values support the view that HUD should not regulate unless there is a legal requirement or persuasive reason for Federal regulation.

The statutory structure of the public housing program is designed to allow local flexibility in the administration of the housing. Public housing projects are owned and run by Public Housing Agencies ("PHA"), which are governmental entities chartered under State law (see, U.S. Housing Act of 1937, section 3(b)(6), 42 U.S.C. 1437a(b)(6)). By Federal statutory policy, Public Housing Agencies are to be vested with "the maximum amount of responsibility in the administration of their housing programs" (U.S. Housing Act of 1937, section 2, 42 U.S.C. 1437). This dynamic policy is not applied and exhausted once and for all at the initial promulgation of a regulatory requirement. HUD has a continuing authority to reexamine existing regulatory requirements, to determine if the existing requirements can be withdrawn or modified, and to allow a broader play to PHA responsibility in administration of its public housing program.

Many PHAs have complained to HUD—in the course of this rulemaking and in other forums—that the requirements of the old rule have hindered or even crippled PHA administration of the public housing program. In this rulemaking, HUD has given a particular weight to this judgment by the entity with statutory responsibility for administration of the program.

For purpose of this rulemaking, there is no need for data on the statistical distribution of PHA difficulties in implementation of the old rule, or other detailed factual data on how the old rule has affected operations at different PHAs. At the level of the individual PHA, experience under the old rule may differ. PHAs may cope with the old rule or the new in very various ways.

When HUD eliminates regulatory obligations under the old rule, PHAs will have a greater freedom to structure local programs in accordance with local desires, without the incubus of a uniform Federal requirement. If a PHA is troubled by aspects of lease and grievance practice which were mandated under the old rule, and which are removed in the new rule, the PHA will presumably structure a different practice, utilizing the new freedom under the new rule. Another PHA may elect to retain aspects of practice no longer prescribed by Federal rule.

Freeing the PHA from a given Federal requirement has two advantages. First, the local consequences of a particular policy can be seen much more clearly from the PHA than from Washington. The PHA can therefore adopt a policy with a better understanding of how the policy will work in the community, and can refine or revise the policy in the light of actual local experience. Second, the PHA can choose a policy that reflects local priority. PHA management policy is a trade-off of different objectives. The removal of Federal regulatory requirements means that the PHA can make the trade-offs in the light of local values. In narrowing the scope of the pre-existing regulatory requirements, HUD defers to local values and to local knowledge of local facts. For this purpose, HUD does not need "new facts" on national operation of the old lease and grievance requirements.

Public comment claims that HUD lacks an adequate "factual basis" for withdrawing requirements under the old rule, citing the decision by the Supreme Court in *Motor Vehicle Manufacturers Asso.* v. *State Farm*, 463 U.S. 29, 103 S. Ct. 2856 (1983). However, so far as opposite to the present rulemaking, *Motor Vehicle* stands merely for the proposition that the revocation of a prior agency regulation is governed by the same standard of judicial review as is the initial promulgation of the regulation—whether the agency action was "arbitrary and capricious". A reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute.

In *Motor Vehicles*, the statute directed the agency (Department of Transportation) to issue standards for the purpose of promoting motor vehicle safety, and to consider available motor vehicle safety data for this purpose. The statute provided that the agency finding must be supported by "substantial evidence" on the record of a formal rulemaking proceeding. The Court held that rescission of a motor vehicle safety standard was arbitrary and capricious. In that case, the agency had not shown an adequate factual basis for rescission of the safety standard.

In the present informal rulemaking, HUD is issuing regulations to implement the 1983 law on public housing lease and grievance requirements. At the same time, HUD is removing various pre-existing regulatory requirements of the old lease and grievance rule, which are not mandated by the 1983 law or any other law. The old rule was issued under HUD's broad authority to issue regulations for programs administered by the Department (section 7(d) of the HUD Act, 42 U.S.C. 3535(d)) (as well as other general rulemaking authority no longer contained in the U.S. Housing Act of 1937) (see 40 FR 33402, 33403, August 7, 1975).

In the areas for which HUD is now removing old regulatory requirements, the present rulemaking differs fundamentally from the deregulation at issue in *Motor Vehicles*. HUD is authorized, but is not directed, to issue regulations for the HUD program. Both in the original promulgation of the old rule, and in the present rulemaking to revise or withdraw aspects of the old rule, HUD proceeds from a wide and flexible rulemaking authority. HUD has discretion to issue or withdraw a rule.

In *Motor Vehicles*, the agency was required to adopt standards for a precise empirical purpose (motor vehicle safety) defined in the statute. In the present case, HUD has discretion, but no obligation, to issue regulations reasonably necessary to promote purposes of the programs administered by the Department.

In *Motor Vehicles*, the agency was required by law to consider "data" relevant to the stated statutory purpose, and to issue a finding supported by "substantial evidence". By contrast, in the present rulemaking, HUD is not directed by law to consider any specific factors, to make a decision based on "data" or "evidence" respecting the factors, or to generate a formal administrative record of the rulemaking proceeding. An agency may consider factors which are relevant to implementation of the particular enabling statutes under which a rule is issued. For HUD, there is wide discretion to decide what elements will be considered in a rulemaking for the public housing program under the United States Housing Act of 1937, including the role of available studies or evidence.

HUD has a plenary authority to modify or withdraw provisions of the old rule, provided only that the agency action may not be "arbitrary and capricious". The regulatory action must be reasonably related to the purposes of the program. HUD's discretion is as broad for the present rulemaking as for promulgation of the original 1975 rule. An agency is not subject to a heavier burden in seeking to deregulate or change an old rule, than for initial promulgation of the rule. The regulation is not frozen in the form originally issued. The Supreme Court has noted that "regulatory agencies do not establish rules of conduct to last forever" (*American Trucking Asso.* v. *Atchison*, 387 U.S. 397, 416, 87 S. Ct. 1608, 1618 (1967)).

In general thrust, this rulemaking seeks to deregulate that which need no longer be regulated, and to devolve to the individual PHA a far broader authority over the local public housing program. In *Motor Vehicles*, the Supreme Court remarked that while deregulation is "not always or necessarily" a sufficient basis for rescission of an existing rule, "it may be easier for an agency to justify a deregulatory action" than to justify enactment of a new regulatory standard (463 U.S. at 42, 103 S. Ct. at 2866). The test in each case is whether the agency can show a reasonable basis for the regulatory action.

This Preamble gives a full explanation of general and particular reasons for each regulatory action.

III. Lease Provisions

A. General

1. Lease Requirements

Lease requirements are simplified and clarified (Part 966, Subpart B). As under the old rule, this final rule describes the types of lease provisions which are required (§ 966.10) or prohibited (§ 966.11). The required and prohibited provisions concern central aspects of the subsidized tenancy.

The rule leaves the drafting of lease provisions which comply with these requirements to the PHA. However, in keeping with historical practice in the public housing program, the rule does not direct PHAs to use a form lease drafted by HUD. In addition to lease provision which are required by the HUD rule, the lease may "contain other provisions which are determined by the PHA and which are not inconsistent with [the HUD rule]" (§ 966.10(a)).

Comments recommend various additions and changes, but do not challenge this general approach.

2. Comments: Objections to Deregulation

Public comment from legal aid and tenant groups objects broadly to the elimination or revision of Federal lease requirements in the old rule, and objects specifically to amendment of particular lease requirements. Comment argues that proposed changes are unconstitutional, unfair or demeaning to tenants. Comment states that the proposed rule eliminates essential tenant protections, and does not protect the tenant from arbitrary PHA action. The proposed rule abdicates Federal power and vests discretionary power in PHAs.

HUD does not dispute that the rule reduces Federal interference in the prerogative of PHA management to develop and revise leases and PHA rules for public housing tenants. The rule enlarges the discretionary power vested in the PHA, and correspondingly reduces Federal prescription of the details of public housing management, and of the relations between the PHA and the tenant. The rulemaking is intended to simultaneously diminish excess Federal controls, and enhance the right and ability of the PHA to run the housing for the benefit of the tenants. Because the lease is the basic contractual instrument which regulates the rights and duties of the PHA and the tenant, the changes in Federal lease requirements allow important and pervasive changes in the relationship between the PHA and tenant, and in day-to-day management of the housing.

HUD does not agree that simplification of leasehold requirements unfairly exposes the tenant to arbitrary PHA action, or deprives the tenant of essential protections. Comments which protest changes in Federal lease requirements appear largely based on a visceral distrust of PHA autonomy, a sense that the PHA cannot be trusted to treat the tenant fairly, that the PHA must therefore be tightly bound by detailed Federal rules for tenant protection in daily management of public housing projects.

HUD does not share this view of the PHA. The establishment of rigid and over-detailed Federal requirements, as under the old lease and grievance rule, is more likely to cause harsh, arbitrary and inefficient action by a PHA, than is a policy that allows the PHA discretion to react to local conditions and local desires, for example, by quickly adopting changes in PHA lease forms or PHA rules. Because of Federal regulation under the old rule, the PHA could not adapt quickly and flexibly to the needs of the tenants, and of effective management of public housing projects. Compliance with Federal requirements is a burden on PHA management, a drain on available administrative and fiscal resources. The burden of compliance with Federal regulation may diminish or exhaust the capacity of PHA management to consider the needs of individual tenants with compassion and consideration.

The revised lease requirements continue to cover many of the most central aspects of the subsidized tenancy. The lease requirements assure that provisions of the public housing lease protect the essential interests of the public housing tenant. These tenant protections include the lease provisions required under the 1983 law (U.S. Housing Act of 1937, section 6(l), 42 U.S.C. 1437d(l)).

A comment by the National Housing Law Project ("NHLP") states that the 1983 law requires PHAs to use the lease forms developed under the old rule, and that HUD's alterations of the lease requirements under the old rule violate a "clear Congressional mandate". This assertion is based on out-of-context language of the May 1983 report by the House authorizing committee, which reports out the public housing lease requirements incorporated in the 1983 law. The Report notes that the bill adds a new provisions under which HUD must require PHAs to utilize fair leases. The House committee language which is quoted in the NHLP comment states that "the committee contemplates that HUD will meet this obligation by retaining the present regulations" (Report 98–123 on H.R. 1, p. 35). In context, it is plain that the committee is only referring to certain specific lease requirements in the old rule, which are covered by the reported bill, and by the statute as enacted in the 1983 law. The House committee report does not contain any language to support an inference, as indicated by the NHLP comment, that the 1983 law was intended to freeze all then-existing HUD requirements for public housing leases.

The House committee bill requires HUD to retain specific elements of the lease requirements under the old rule: the prohibition of leases which contain unreasonable terms and conditions (called prohibited lease provisions); the obligation to maintain the projects in decent, safe and sanitary condition; requirements for adequate notice of lease termination; and good cause grounds for termination of tenancy (H.R. 1, section 206, reported May 13, 1983). These specific lease requirements were incorporated varbatim in the 1983 law as enacted. The House committee report states (*Id.* at 36):

> Since 1970 HUD has prohibited PHAs from utilizing * * * unfair [lease] clauses * * *. The bill requires that those regulatory prohibitions be retained and that HUD prohibit any additional clauses which are unreasonable. Beyond prohibiting certain unfair clauses, the bill also requires the leases to contain certain basic protections. They include clauses obliging PHAs to maintain the premises in decent, safe and sanitary condition, and to provide adequate notice before evicting tenants. The committee also contemplates that HUD will retain the existing regulations regarding *these provisions* (emphasis supplied).

Under the House bill and the 1983 law, HUD is required to retain specific types of lease provisions required the old rule. (In the proposed lease and grievance rule published in December 1982, HUD had suggested the possible elimination of a number of these provisions.) There was not, however, any broad intention by the House committee, as claimed in the NHLP comment, to force PHAs to continue using leases developed under the old rule, or to bar HUD from changing lease requirements under the old rule. In any event, such intention would not be effective unless implemented in the actual statutory language. The actual language of the law as passed by Congress is very precise as to the elements which must be included in a public housing lease. All of these statutory elements are implemented in this rule. There is no statutory bar against changing other elements of the lease requirements in the old rule.

3. Deregulation: Other Comments

Some comments urge that PHAs be permitted a greater freedom to determine lease provisions. There should be more local control. PHAs should be allowed to structure leases in accordance with State law. HUD should allow a PHA to include any desired provisions in the lease, if the lease is consistent with State law.

HUD is sympathetic to the need for local autonomy. The rule is designed to strip away unnecessary Federal controls on the content of public housing leases. There are, however, legitimate reasons to prescribe minimum Federal requirements for core provisions of a public housing lease.

—First, Federal regulation is necessary to implement lease requirements mandated by the 1983 law, such as the specification of prohibited lease provisions, and of statutory grounds for termination of tenancy.

—Second, other lease provisions are needed to establish a tenancy which reflects the statutory and regulatory character of a public housing tenancy, such a provision for determination of rent in accordance with HUD requirements (which are substantially dictated by Federal statute), and for periodic reexamination of family income for this purpose.

—Third, some lease provisions—while not specifically required by statute—reflect specific characteristics of a public housing tenancy, which are not generally characteristic of a private and unsubsidized tenancy under State law, such as statement of conditions in which the family can be required to move to another public housing unit, and statement of the obligations of an assisted family. For example, the lease prohibits the tenant from receiving other Federal housing subsidy and prohibits fraud in connection with a Federal housing assistance program.

—Fourth, some provisions establish other basic conditions of the subsidized tenancy, for protection of public housing residents, and for protection of the Federal subsidy investment in the housing. For example, the lease provides that the PHA must comply with local code requirements materially affecting safety of the occupants; the PHA may only provide for a "reasonable" security deposit and "reasonable" penalties for late payment of rent of charges; the tenant may only use the unit for residence by the household, and may not use the dwelling unit for unlawful purposes.

In drafting the required lease provisions in this rule, there is conscious and consistent endeavor to minimize the extent of Federal regulation, both as to the subjects covered and as to the amount of detail in the rule. The required provisions are stated in broad terms, which will protect the relevant Federal interest and concern, but with maximum freedom for the PHA to devise lease provisions which satisfy the general requirement. The PHA has great freedom to draft lease provisions which accord with local law and with local practice and preference (cf., § 966.10(a)).

In the main, PHA comments approve the proposed HUD lease requirements, with some suggestions for particular improvements. (The suggestions will be discussed below.) The lease revisions are fair and equitable to both management and tenant. The revisions promote efficiency, but retain without compromise all essential elements of tenant rights. Comments state that the required lease provisions are clear and easy to understand, and approve streamlining of required lease language.

4. Applicability of Lease Requirements

The lease requirements in Subpart B of Part 966 apply to "public housing" § 966.1(b)(1)). Public housing is defined in this rule (§ 966.2) as housing assisted under the U.S. Housing Act of 1937, except housing assisted under section 8 (rent subsidy) or section 17 (housing development or rental rehabilitation grants) or the 1937 Act. The term "public housing" as defined in this rule includes housing assisted under the Leased Housing programs under section 23 or section 10(c) of the U.S. Housing Act of 1937 before the Housing and Community Development Act of 1974. (Because of a printer's typographical error, the definition of "public housing" in the July 1986 proposed rule is appended to the definition of the term "family".) The rule provides (§ 966.1(b)(2)) that the Subpart B lease requirements do not apply to Indian Housing (including Mutual Help and rental projects of Indian Housing Authorities), or to the Turnkey III homeownership program.

Comment recommends that the lease requirements should be applicable to Turkey III and Mutual Help projects, to Indian Housing Authority rental projects, to post-1974 section 23 and section 10(c) projects, and to PHA-owned section 8. The comment does not articulate the reasons for these recommendations. The recommendations are not adopted.

Unlike the public housing rental programs, the Turnkey III program and the Mutual Help program (a program for Indians) use forms of homeownership agreement drafted by HUD. The regulations and HUD form agreements for these programs give the occupant a lease with option to purchase, and define in detail in rights of the occupant respecting occupancy and purchase of the unit. There is no need for overlapping regulation governing the form of a lease in these programs.

Historically, Indian housing, including Indian housing rental projects, was not subject to HUD regulation of dwelling lease provisions. This separate treatment reflects HUD's recognition of the special needs of the Indian housing program. However, lease requirements in the 1983 law are applicable to Indian housing as to other public housing, since there is no statutory exception. Therefore this rule adds provisions necessary to implement lease requirements of the 1983 law for Indian rental projects (new § 905.303). These provisions are intended as the minimum necessary to comply with the statutory requirements for dwelling leases. The rule allows the greatest possible room for Indian Housing Authorities to adapt the 1983 statutory requirements to conditions of reservation or non-reservation Indian housing, including accommodation to tribal courts and tribal law.

Comment recommends applying the lease requirements to post-1974 section 23 or section 10(c) projects. There are no post-1974 section 23 or section 10(c) projects. Section 10(c) and section 23 are sections of the version of the U.S. Housing Act of 1937 before recodification in the Housing and Community Development Act of 1974.

There is no reason to apply the public housing lease requirements to a section 8 project which is owned by a PHA. First, section 8 is not subject to the public housing lease amendments in the 1983 law. Lease requirements in the 1983 law were enacted as section 6(l) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(l)). Pursuant to section 8(h) of the 1937 Act (42 U.S.C. 1437f(h)), section 6 of the Act does not apply to assistance under section 8. Second, the statutory, regulatory and contractual structure of the section 8 rental assistance programs is very different from the public housing program for which the lease provisions are designed. There is also no reason to have different lease requirements if the section 8 owner happens to be a PHA. Third, section 8 project owners, including PHA-owners, are required to use a HUD prescribed model lease. There is therefore no need for overlapping regulation governing the form of section 8 lease. The present regulation only covers the public housing programs, and is issued by the HUD Assistant Secretary for Public and Indian Housing. The section 8 programs are within the jurisdiction of the HUD Assistant Secretary for Housing.

B. PHA Obligations

1. Maintenance

a. Duty to Maintain. The 1983 law provides that a public housing lease must "obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition" (U.S. Housing Act of 1937, section 6(l)(2), 42 U.S.C. 1437d(l)(2)). The provision of "decent, safe, and sanitary" housing is the statutory purpose of the public housing program (U.S. Housing Act of 1937, section 3(b)(1), 42 U.S.C. 1437a(b)(1)).

The rule (§ 966.10(f)) states that a lease must provide that:

> (1) The PHA shall provide services and maintenance for the dwelling unit, equipment and appliances, and for the common areas and facilities, which are needed to keep the housing in decent, safe and sanitary condition.
>
> (2) The PHA shall comply with the requirements of applicable State and local building or housing codes concerning matters materially affecting health or safety of the occupants.

This formulation balances the statutory requirement to state in the lease the PHA duty to maintain the unit, and the statutory aim of vesting local PHAs with the maximum amount of administrative responsibility (U.S. Housing Act of 1937, section 2, 42 U.S.C. 1437).

The PHA has the contractual duty to maintain the unit in compliance with the decent, safe and sanitary standard, as applied to circumstances in the locality. This comprehensive obligation removes, however, the need for HUD to require that the PHA include a detailed statement of PHA maintenance obligations in the lease.

b. Compliance with State Codes. The lease requirement to comply with State housing codes supplements the decent, safe and sanitary standard, and applies to code violations which risk the health and safety of the tenant. The PHA's duty to comply with State housing code requirements is enforceable by the tenant as a contractual duty of the PHA under the lease. In most cases, the PHA's breach of this obligation is also a violation of the PHA's duty to maintain the unit in decent, safe and sanitary condition.

Local code violations which do not materially affect health or safety are not enforceable by the tenant under the lease. The enforcement of local code standards is in general appropriately left to the judgement of local officials in the light of local conditions. The Department does not believe there is justification to impose on PHAs a blanket Federal regulatory requirement to incorporate in the lease with an individual tenant the PHA's obligation to comply with local code requirements. However, PHA violation of local code conditions affecting health or safety are so fundamental, and so bound to achievement of decent, *safe* and sanitary housing, that the code violations are properly a subject of Federal regulation.

PHA comment states that the PHA should only be required to maintain the unit in accordance with State or local law. A unit which complies with local code is decent, safe and sanitary. The comment would therefore remove from the lease a separate requirement to maintain the unit in decent, safe and sanitary condition, as distinguished from the PHA's obligation to comply with local code.

Legal aid comment states that the rule should retain the unit maintenance requirements in the old rule. Erosion of minimum safety standards is ill advised and unnecessary. Existing standards were not onerous for PHAs.

The final rule does not modify the proposed provisions expressing the PHA duty for maintenance of the unit.

Compliance with local code overlaps with the duty to provide service and maintenance needed to keep the housing in decent, safe and sanitary condition. Elements necesary to comply with code (e.g., concerning electrical wiring for a unit) may also be necessary so that the unit is decent, safe and sanitary. Depending on comprehensiveness of the local code, and on whether the code is applicable to a public housing unit, satisfaction of local code may also constitute satisfaction of the requirement to keep the housing in decent, safe and sanitary condition.

However, the lease must state, as directed by the 1983 law, that the PHA is obligated to maintain the unit in decent, safe and sanitary condition. This obligation is not wholly subsumed in the PHA's duty to comply with local code, and must be separately expressed in the lease. A community may lack a housing code, or the code may not embrace all elements of service and maintenance necessary to assure that the unit is decent, safe and sanitary. Code may not establish a continuing requirement governing status of existing units, as opposed to requirements imposed when a unit is built, or as a condition for initial grant of a certificate of occupancy. A local code may not be applied or interpreted in a way that satisfies the PHA's maintenance obligations under the U.S. Housing Act of 1937. For a variety of reasons, compliance with local code is not always or necessarily equivalent to maintaining the unit in decent, safe and sanitary condition.

In a locality where compliance with local code signifies that the unit is decent, safe and sanitary, a lease provision which requires the PHA to maintain the unit up to this standard does not, in principle, subject the PHA to any additional contractual burden. We acknowledge, however, that there is a potential for legal dispute between the PHA and the tenant as to whether compliance with local code satisfies the Federal statutory standard as stated in the lease.

HUD does not agree with comment which claims that the simplification of lease requirements somehow erodes or or diminishes safety standards in the old rule. The requirement that the PHA must provide services and maintenance required for "safe" operation of the housing is simply and explicitly stated in the lease, as is the requirement to comply with local codes affecting "health and safety". The PHA obligation is comprehensively stated, in the language mandated by the 1983 law. There is no reason to add redundant lease verbiage on the subject of tenant safety. Most important, we do not believe that the housing will be made safer by adding more wordage to the lease.

Under the lease, a PHA must comply with local code on matters "materially affecting the health or safety of the occupants". Comment states that a PHA should be obliged to comply with all code requirements, not merely with requirements affecting health and safety. Another comment objects that the PHA lease obligation is restricted to matters "materially" affecting health or safety.

These comments miss the reason for using State code requirements as the basis for establishing PHA obligations under the lease. The purpose is not to empower the tenant to treat all technical violations of local code as violations of the lease. The purpose is to focus on that aspect of local code enforcement which is most directly related to the Federal statutory mission of the public housing program, and is most critically related to the welfare of the public housing tenants. Independent of the lease, local code enforcement authorities have all of the normal powers to enforce code requirements against the PHA in accordance with local law. Moreover, States have the power, if they wish, to grant public housing or other tenants a procedure and standing to enforce local code requirements. The State and locality have the primary role of deciding how to enforce a code scheme which is a creature of State and local choice. Except for specific purposes of the public housing program, HUD has no reason to interfere in the local procedures for enforcement of local code.

Local codes may reflect local policies which have little to do with national policies of the public housing program, or as to which there is no immediate reason for Federal involvement or concern. For example, local code may include elements designed to implement local land use controls, or to encourage use of local labor (by requiring use of stick built techniques, or by prohibiting use of new materials or construction techniques). For the present purpose, we merely assert that local concerns and interests as reflected in the local code are not automatically the business of the Federal government, to be enforced by the tenant through provisions of the public housing lease.

Finally, the Federal interest in enforcement of local code requirements through the public housing lease should only apply when there is "material" violation of local requirements related to health or safety of the occupants. The purpose of the lease provision is not to capture any technical code violation marginally related to tenant safety, but those violations which are likely to result in serious injury to the tenants. The pursuit of minor violations of local code is best left to the enforcement policies and techniques of the local authorities. (The rule provision on compliance with local code is substantially identical to a parallel provision of the Uniform Residential Landlord and Tenant Act. Uniform Act, section 2.104(a)(1).)

c. PHA Obligation When Unit is Dangerous—(1) PHA Duty to Offer Substitute Unit. The final rule provides (§ 966.10(f)(3)):

> If the condition of the dwelling unit is hazardous to the health or safety of the occupants, and the condition is not corrected in a reasonable time, the PHA shall offer the Tenant a replacement dwelling unit if available. The PHA is not required to offer the Tenant a replacement unit if the hazardous condition was caused by fault or negligence of Household members, or of guests, visitors, or other persons under control of Household members.

These provisions reflect the Federal interest in correcting conditions which may endanger health or safety of public housing residents.

The new rule provides that the PHA must offer a replacement unit if a hazardous condition is not corrected "in a reasonable time". The new rule does not require that the PHA offer the tenant a public housing unit.

Comment states that the PHA should not be allowed a "reasonable" time to fix the hazardous conditions. The comment points out that what is "reasonable" to a PHA employee may not be reasonable for a tenant suffering a hazardous condition. HUD appreciates that the perspective of the tenant naturally differs from the perspective of PHA officials. The tenant may have difficulty capturing attention of PHA officials, or persuading them that the unit is dangerous and that the tenant should be offered a new unit. Nevertheless, HUD has not revised the rule in response to this comment. To a considerable degree, the decision on what to do if there is a dangerous condition in the unit should be left to the discretion and good sense of the PHA. The PHA decision should be based on the immediate facts of the case, and the PHA resources on hand. The decision is not readily reducible to a more precise formula, that should be incorporated in the boilerplate of public housing leases.

The statement of tenant obligations under the lease is revised to provide that the tenant must move from a dangerous dwelling unit (§ 966.10(h)(1)(v)(B)). Thus the revised rule defines the correlative duties of the PHA and the tenant in a situation where the tenant's original unit is no longer safe for continued occupancy. The PHA must offer a replacement dwelling unit if available, and the tenant must move.

Comment states that the PHA should not be required to relocate the tenant if dangerous conditions in the unit were caused by action or negligence of the family or its guests (such as a fire caused by the family; leaks not reported to the PHA; hazards resulting from the family's housekeeping habits). The tenant should be evicted, not relocated to destroy another unit. In response to the comment, the rule is amended by specifying that the PHA is not required to offer the tenant a replacement unit if the dangerous condition in the unit was caused by fault or negligence of the household members, or of guests, visitors or other persons under the control of household members (§ 966.10(f)(3)). The PHA may evict the family if the family actions which caused the damage are grounds for termination of tenancy (serious or repeated violation of the lease or other good cause; see § 966.21). It should also be noted that on normal contractual principles, a tenant's breach of the lease (by damage to the unit) may relieve the PHA of reciprocal obligations to the tenant under the lease, such as the promise to offer replacement housing.

(2) Abatement of Rent. The old rule provided that if the PHA does not correct dangerous conditions in a reasonable time, rent must be abated "in proportion to the seriousness of the damage and loss in value as a dwelling * * *" HUD proposed to delete the requirement for abatement of rent. Comment states that the lease should allow or require abatement for hazardous or substandard conditions. Abatement is an effective and cheap non-judicial mechanism to resolve disputes. The proposed change eliminates a valuable and easily-administered remedy for serious health and safety problems. Abatement enables the tenant to get the attention of a recalcitrant and non-responsive PHA. Eliminating the tenant's right to abate rent for dangerous conditions removes an incentive for management to maintain the property, and puts the tenant family at risk. Abatement is legally and morally justified if the PHA does not render services for which the tenant has paid. Abatement of rent encourages lessors to maintain property. The rule should encourage the PHA to repair public housing units, and should discourage the PHA from transferring the tenant from a dangerous unit.

Comment notes that the abatement remedy (as defined under the law of a particular State) is not useful. The comment thus implies that the Federal regulations should establish a Federal right to abatement in addition to any right of abatement under State law. Other comment states that a PHA should be held responsible for compliance with the same standards as a private landlord. Abatement is a principal tool to enforce health and building codes.

The final rule is silent on the tenant's right to rent abatement to remedy a breach of PHA obligations under the lease. The rule also does not require that the lease include a provision which abates the rent for hazardous or substandard conditions, or which establishes a standard for computing the amount of an abatement.

Abatement is a two edged sword. If rent is abated or withheld, the PHA loses revenue that would otherwise be available for projection operation. Denial of revenue may force the PHA to reduce maintenance and other tenant services. Denial of PHA income, by abatement or other rent withholding techniques may accelerate a downward spiral of project management and maintenance, where each reduction of rental income leads to reduction of necessary tenant maintenance, and the reduction of maintenance leads to additional withholding.

The deterioration of project services affects tenants who pay the rent, as well as those who initially claim that there is justification for refusing to pay the full rent claimed by the PHA. This deterioration may in turn lead to withholding by more and more tenants. This may also occur because tenants who pay rent are naturally infected by the example of other tenants who, rightly or wrongly, claim a right to deny full payment of the rent.

Comment states that HUD should not take away the tenant's right to abatement of rent under State law. Comment claims that in most States, elimination of a Federal abatement requirement conflicts with the State law warranty of habitability.

Because abatement may result in severe and harmful effects on management of the housing, HUD is unable to justify restoration of a Federal right to abatement of the rent. However, the rule does not prohibit or preempt authority for abatement under State statute or caselaw. Absent a Federal requirement or prohibition, the existence or non-existence of a right to abatement is determined by State law. The Federal rule does not take away a right to abatement under State law, and does not interfere with a State law warranty of habitability.

Federal requirements governing the form of a public housing tenancy coexist with State-law requirements which spell out incidents of the tenancy, so long as the State requirements do not contradict requirements of the Federal statute and rule. The State law may not destroy or diminish rights of the tenant and the PHA under the Federal rule, but may add additional tenant protections, such as a right to rent abatement as a remedy for breach of PHA obligations in the lease. The rule allows but does not require abatement of rent. The rule therefore defers to State policy, as expressed in State law, concerning the right of the tenant to abate rent as a remedy for PHA breach. If a tenant may abate rent for any landlord, including a public landlord, the tenant may also abate rent payable to a PHA.

Comment asserts that the rule should provide that a PHA must comply with remedies under State law for the PHA's failure to maintain the unit. HUD concludes, however, that there is no sufficient justification for federalizing State remedies. State remedies reflect values and policies in the jurisdiction, not necessarily the purposes of the national public housing program. HUD should not blindly incorporate local remedies into lease requirements for the national public housing program. A jurisdiction which establishes a right to remedies under State law may likewise establish procedures to effectuate the remedies, including a requirement that the remedies must be incorporated in the lease.

The 1983 law requires a lease provision which obligates the PHA to maintain the unit in decent, safe and sanitary condition (U.S. Housing Act of 1937, section 6(l)(2), 42 U.S.C. 1437d(l)(2)). A comment claims the 1983 law does not authorize HUD to eliminate the tenant's right to abatement under the old rule, asserting that the 1983 law requires HUD to retain the lease requirements of the old rule.

The new rule provides that the PHA must provide services and maintenance, for the dwelling unit, equipment and appliances, and for the common areas and facilities, which are needed to keep the housing in decent, safe and sanitary condition (§ 966.10(f)(1)). This provision constitutes literal and complete implementation of the 1983 law, and is substantively similar to parallel provisions of the old rule. Nothing in the text of the 1983 law freezes the lease requirements precisely as framed in the old rule. Nothing in the 1983 law requires inclusion of provision of rent abatement, or requires retention of rent abatement provisions that were contained in the old rule.

d. Maintenance by Tenant. The rule (§ 966.10(j)) states that:

> The lease may provide that the Tenant shall perform seasonal maintenance or other maintenance tasks, as specified in the lease, where performance of such tasks by tenants of dwelling units of a similar design and construction is customary; provided, that such provision is included in the lease in good faith and not for the purpose of evading the obligation of the PHA. The PHA shall exempt the Tenant if the PHA determines that because of age or physical disability members of the Household are unable to perform such tasks.

This provision is substantially drawn from a parallel provision of the old rule.

Comment argues that HUD should delete the rule provision which allows a PHA to require the tenant to perform "customary" maintenance. Maintenance is a PHA function. The PHA should not be allowed to shift this maintenance responsibility to the tenant. The comment also observes that the regulation standard for when maintenance may be shifted to the tenant (i.e., the practice which is "customary" in dwelling units of similar design and construction) is too vague, and should be spelled out in the rule.

Under the lease provisions mandated by the 1983 law, the basic responsibility for maintenance of the project rests with the PHA. The lease must "obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition" (U.S. Housing Act of 1937, section 6(l)(2), 42 U.S.C. 1437d(l)(2)). However, this allocation of responsibility for maintenance of the project under the statute does not mean that the tenant may not be required to perform unit maintenance tasks which help the PHA maintain the project in decent, safe and sanitary condition. If the tenant must perform maintenance for the unit, the tenant may be more likely to clean and care for the unit, and less likely to damage the unit, than if the tenant is the passive recipient of all PHA maintenance services. Each individual tenant is a beneficiary of the PHA duty to maintain the project. In meeting this responsibility, the PHA may be supported by the requirement for all tenants to perform certain maintenance responsibilities respecting their individual units.

The required lease provisions in the 1983 law were enacted verbatim in the form previously reported by the House Banking Committee, and then passed by the House of Representatives (unlike the grievance procedures, for which the law as enacted differs markedly from the Bill previously reported by the House). The Report by the House Banking Committee notes that the reported bill includes a clause obliging the PHA to maintain the premises in decent, safe and sanitary condition. The Report states that "the Committee * * * contemplates that HUD will retain the existing regulations regarding these provisions" (Report 98-123 on H.R. 1, p. 36). Under the "existing regulations" (i.e., the old lease and grievance rule) a requirement for the PHA to "maintain the premises and the project in decent, safe and sanitary condition" co-exists with authority for a lease provision in which the tenant agrees to perform maintenance tasks "according to local custom". Thus the 1983 law is not intended to sweep aside the potential for lease provisions which require the tenant to perform maintenance tasks in accordance with local custom.

The new rule provides, as did the old rule, that an agreement for the tenant to perform maintenance tasks must be included in "good faith" and not for the purpose of evading the PHA obligation for maintenance of the project. The PHA right to transfer maintenance responsibilities to the tenant is not open-ended, but depends on local landlord-tenant practice. The designation of tasks to be performed by the tenant must be customary for units of similar design and construction in the locality. Because this contractual standard depends on tenancy practices in each locality, the definition of what practice is "customary" is not stated in the HUD regulation, but depends on a concrete examination of local practice.

Comment states that the HUD rule should specify that a PHA may not shift tasks to the tenant if the tasks must be performed by the landlord under local law. This comment is not well taken. The HUD rule does not override a local law which requires the landlord to perform specific maintenance tasks.

The PHA must exempt the tenant from tenant maintenance tasks if members of the household are not able to perform the tasks "because of age or physical disability" (§ 966.10(j)). A PHA states that a PHA should not be required to exempt elderly or handicapped from tenant maintenance requirements, such as mowing, if the PHA has elderly or handicapped units, but the tenant wants to live in an area where tenant maintenance is required.

The comment is not adopted. It is not fair or practicable to impose a maintenance requirement on the tenant if members of the household cannot perform the maintenance because of age or disability. The tenant would have to find other persons to perform the tasks, or would be placed in violation of the lease. The tenant may not be able to find or pay someone to perform the tenant maintenance obligation.

The PHA may consider the ability of the tenant to perform tenant maintenance when deciding whether to admit the tenant to a tenant maintenance unit. In addition, if a tenant is already living in a unit, but there is no household member who can perform tenant maintenance tasks appropriate for the unit, the PHA may determine that the unit is inappropriate for the household composition, and require the tenant to move to another public housing unit (§ 966.10(h)(1)(v)(A)(1)).

2. PHA Duty to Comply with Federal and State Requirements

Comment states that a lease should provide that a PHA must comply with Federal law and HUD regulations, including requirements for calculation of rent and utility allowances. In HUD's view, the comment fails to justify importing HUD requirements wholesale into the lease between the PHA and a tenant, to be enforced as a contractual duty of the PHA to the tenant under the public housing lease. Required lease provisions are only a vehicle to express basic responsibilities of the PHA to the tenant.

The lease provisions which are required by the 1983 law regulate key aspects of the assisted tenancy, but do not contemplate that the tenant must have a contractual leasehold right to enforce all statutory and regulatory duties of the PHA across the board. For some HUD regulations, the right to enforcement may be vested in HUD's administrative discretion, but not in the tenant. For other HUD regulations, the tenant may have a direct right of action outside of the lease, to demand benefits owing to the tenant from the PHA. Existence of this right against the PHA does not depend on incorporation in the lease (cf., *Wright v. Roanoke*, 479 U.S.——, 107 S. Ct. 766 (1987)).

With respect to rent, the rule provides that the rent "shall be determined by the PHA in accordance with HUD regulations and requirements" (§ 966.10(c)). Conversely, the tenant may not be required to pay a rent which is not determined in accordance with HUD requirements.

The proposed rule provided that a lease must be "in accordance with State and local law". This provision is not contained in the final rule. In general, State and local law independently determines whether State and local law is applicable to a public housing tenancy, and whether the State requirements must be included in the lease.

Comment states that the rule should provide that State tenant protections control if State protections conflict with requirements under the Federal rule. This recommendation is not adopted. The tenancy must comply with all requirements of this rule. Tenant will have all the leasehold rights provided under the HUD rule, and any additional rights afforded by State and local law.

C. Tenant Obligations

1. Statement of Tenant Obligations

The lease states the key tenant responsibilities concerning use of the unit and behavior of family members and family guests (§ 966.10(h)). The statement is expanded and clarified from the treatment of this subject in the old rule.

Regulations for the section 8 existing housing certificate program state family obligations under that program (§ 882.118; cf. also, § 882.210). Like the public housing program, the section 8 certificate program is run by local PHAs. In the certificate program, the roles of the PHA and owner are separate. In the public housing program, these roles are combined. Thus the statement of tenant obligations may be roughly divided into: (1) Items reflecting the common PHA role in the public housing and housing certificate programs, and (2) items reflecting the obligations of the tenant to the PHA as owner of a public housing dwelling unit.

For the first group of items, the statement of tenant obligations in this rule is substantially conformed for the public housing and housing certificate programs (with some technical differences): Requirement to use the dwelling unit for family residence (§ 966.10(h)(1)(i)(A)), prohibition against transferring use of the unit (§ 966.10(h)(1)(ii)), duty to give necessary information to PHA (§ 966.10(h)(1)(iv)), agreement not to commit fraud in connection with a Federal housing assistance program (§ 966.10(h)(2)(v) and § 966.10(h)(3)(i)), prohibition of duplicative Federal housing assistance (§ 966.10(h)(2)(vi)). In the public housing program, these provisions are contained in the lease, and serious or repeated breach of tenant lease obligations is ground for termination of tenancy (see § 966.21).

General comments note that the statement of tenant obligations in the rule is fair to both the PHA and tenant.

The following sections of this Preamble discuss aspects of tenant obligations under the lease:

—Crime or other violation of law. Section III.C.2.
—Damage or disturbance. Section III.C.3.
—Responsibility for third party acts. Section III.C.4.
—Guests. Section III.D.
—Prohibition of fraud. Section III.E.
—Use of unit for family. Section III.F.
—Rent and charges. Section III.G.
—Duty to supply information. Section III.H.
—Transfer to another public housing unit. Section III.I.
—Inspection of unit. Section III.J.
—PHA rules. Section III.Q.3.

2. Violation of Law by Household Members

a. Violation of State Law As Ground for Termination of Tenancy. Comment states that the PHA should be permitted to terminate tenancy for violation of "applicable" Federal, State or local law. The comment asserts that denying enforcement against a resident who violates the law is bureaucratic interference with autonomy of local agency practices, and impedes the efforts of the PHA to protect law-abiding residents.

Federal law prohibits termination of the public housing tenancy "except for serious or repeated violation of the terms or conditions of the lease or for other good cause" (section 6(l)(4) of the U.S. Housing Act of 1937 as amended by the 1983 law, 42 U.S.C. 1437d(l)(4)). Tenant violation of applicable law is not a separate statutory ground for termination of tenancy, but may be a ground for termination of tenancy if the violation of law is also a serious or repeated lease violation, or is "other good cause" for termination of tenancy.

The rule provides (§ 966.10(h)(1)(iii)) that the tenant must "comply with any State or local law which imposes obligations on a tenant *in connection with the occupancy of a dwelling unit and surrounding premises*" (emphasis added) (no change from proposed rule). This requirement is included in the statement of tenant obligations under the lease. Thus violation of this provision is a violation of the lease, and is ground for termination of tenancy if the violation is either serious or repeated. The tenant lease obligation under this provision pertains only to State and local laws which impose obligations on a tenant in connection with occupancy of the unit and premises.

Comments objects that this provision only applies to violation of State law which imposes obligations on a tenant, and that the provision may only allow termination of tenancy for violation of State law on project premises. There should be no distinction between violation of law committed on project grounds or off site (such as homicide in a public park). HUD agrees that the PHA needs, and this rule provides (§ 966.10(i)), clear authority to terminate tenancy for violent crime or drug-dealing by family members, both on and off the project site. However, the present provision (§ 966.10(h)(1)(iii)) is only directed at obligations imposed by State law on a tenant. Other provisions of the rule and lease deal particularly with responsibility for criminal actions by family members on or off the project site. (See discussion at section III.C.2.b of this Preamble.)

The rule allows termination of tenancy for breach of a State law which imposes tenant obligations in connection with the unit and project. Comment suggests, as an alternative formulation, that the rule should allow termination of tenancy for law violation which significantly affects health and safety of PHA tenants. HUD believes that this alternative is too narrow, and would be hard to apply. The PHA would be forced to prove the existence of a significant effect, as well as a simple breach of the State law. The suggestion is not adopted.

Comment claims that to satisfy *due process* a termination for violation of State or local law must be based on a material violation which significantly affects livability of the property, or the health or safety of tenants. The Department finds no Constitutional basis for this assertion. The substantive standard for termination of tenancy is not prescribed by the Constitution. A termination for violation of State or local law concerning occupancy of the dwelling unit or premises is reasonably related to the PHA's statutory and contractual responsibilities for management of the housing.

Comment asserts that the tenant should be obligated to comply with all applicable law, including both statute and caselaw. The rule (§ 966.10(h)(1)(iii)) requires the tenant to comply with any State or local law which regulates tenant behavior concerning occupancy of the housing. The legal obligation under State or local law may arise from any binding source of law, including statute, regulation or caselaw.

b. Tenant Responsibility for Crime—(1) Lease Language. In development of this final rule, HUD has reexamined and substantially revised lease provisions about responsibility of the tenant for criminal acts by members of the family and other persons. In accordance with section 6(c)(4)(C) of the United States Housing Act of 1937 (42 U.S.C. 1437d(c)(4)(C)), the lease provisions are intended to help "assure that satisfactory standards of tenant security and project maintenance are formulated and that the public housing agency * * * enforces those standards fully and effectively. * * *" The lease language will provide a strong contractual basis for action by the PHA against a tenant who uses the unit or project for criminal activity, or whose household members commit crimes of physical violence or trade in narcotics, on or off project grounds. Full and effective enforcement by the PHA of the family's responsibility for criminal acts under the lease is an important tool in the struggle against public housing crime.

Control of crime in public housing is one of the most urgent issues for public housing residents and managers. The fear and fact of crime have a profound and destructive effect on life in public housing projects. Residents are targets of crime and terror by other residents. Family members suffer violence and intimidation. Units are burglarized and damaged. Crime in public housing leads to the disintegration of project and family life.

The required lease language in the old rule provides that the tenant must refrain from "illegal activity which impairs the physical or social environment of the project" (old rule § 966.4(f)(12)). The language in the proposed rule provides that the tenant "shall not use the dwelling unit for unlawful purposes, [or] engage in or permit unlawful activities in the unit or project * * *" (proposed rule § 966.10(g)(3)).

Under the final rule, the lease must provide that the tenant and other members of the household "shall not engage in criminal activity in the dwelling unit or premises, and shall prevent criminal activity in the unit or premises by guests, visitors, or other persons under control of Household members" (§ 966.10(h)(2)(iii)). In addition to the required lease language, the final rule clarifies (§ 966.10(i)(1)) that a PHA may include optional lease provisions which state that:

> any of the following criminal activities by any Household member, *on or off the premises*, shall be a violation of the lease, or other good cause for termination of tenancy:
>
> (i) Any *crime of physical violence* to persons or property.
>
> (ii) illegal use, sale or distribution of *narcotics*. (Emphasis supplied.)

Finally, the rule provides (§ 966.10(i)(2)) that the PHA may terminate tenancy for criminal activity, and consequently may evict members of the household, "before or after conviction of the crime".

(2) Prohibited Criminal Activity.—The final rule contains a broad and simple prohibition of "criminal activity" in the dwelling unit or "premises". Family members may not engage in criminal activity, and must prevent criminal activity by third parties under control of the family (§ 966.10(h)(2)(iii)). The final rule refers to "criminal" activity, rather than "illegal" (old rule) or "unlawful" (proposed rule) activity.

In the old rule, the prohibition only applied to illegal activity which "impairs the physical and social environment of the project". This limitation is not included in the new rule. The old language is too vague, and creates uncertainty as to what kinds of crime are covered. To terminate tenancy under the old standard, the PHA must, in principle, demonstrate two elements: That there was illegal activity, and that the activity somehow "impairs the physical and social environment". Under the new rule, the PHA only has to demonstrate that there was on-site crime attributable to the family.

The rule does not otherwise describe or restrict the types of on-site crime covered by the prohibition. HUD assumes that in practice PHAs most often want to evict tenants for crimes that cause harm to residents or PHA employees, or which cause damage to project property. The PHA is most concerned with crimes that affect the PHA.

The distinction between a misdemeanor and a felony under State or Federal criminal codes is also not a useful way to designate crimes which constitute a violation of the lease. The line between misdemeanor and felony may be different in different jurisdictions, and some jurisdictions may use other schemes or terminology to distinguish between lesser and greater crimes.

A distinction between termination for acts of greater and lesser importance is built into the general statutory standard for termination of tenancy. The prohibition of "criminal activity" in the unit or project applies both to a single crime (such as a mugging) and an ongoing pattern of criminal activity (such as use of the unit for manufacture, distribution or sale of drugs). The family may be evicted for "serious or repeated" lease violations. If the PHA seeks to evict for a single crime, the PHA must persuade the court that the single crime is a serious violation of the lease. As in other cases where the PHA seeks to evict for a "serious" lease violation, the court will apply the general standard for termination of tenancy against the facts of the particular case.

Language of the proposed rule would prohibit use of the unit for "unlawful purposes" and would also prohibit the PHA from engaging in or permitting "unlawful activities". For a prohibition of on-site crime, the distinction between "purposes" and "activities" is both unclear and unnecessary. The final rule prohibits criminal "activity". The tenant is not evicted for having unlawful "purposes" but for engaging in some concrete criminal activity (accompanied by the *mens rea* for the particular crime).

(3) Third Party Crime. Under the new rule (§ 966.10(h)(2)(iii)), the lease provides that the tenant must "prevent criminal activity in the unit or premises by guests, visitors, or other persons under control of Household members". The tenant's responsibility for third party criminal acts under this lease provision only applies to third party criminal activity "in the dwelling unit or premises". (See section III.C.2.b.(4) concerning responsibility for on or off-site crime by a member of the public housing family.)

The old rule provides that the tenant must refrain from illegal activities. However, there is no explicit provision that the tenant is responsible for illegal activity by a third party on the premises with the tenant's consent. There are provisions which make the tenant responsible for damage by family guests (§§ 966.4(f) (9) and (10) of old rule), and for disruptive conduct by other persons on the premises with the tenant's consent (§ 966.4(f)(11) of old rule).

PHA comment states that the tenant should be responsible for acts by family friends and guests. HUD agrees that the rule should strengthen the contractual responsibility of the tenant for crime and other harmful on-site activity by third parties present on the premises by choice of the family. The existence of contractual responsibility under the lease fortifies a family's incentive not to invite third parties for criminal purposes (e.g., a drug dealer), and the family's incentive to stop guests from committing crimes in the project.

For further discussion of tenant responsibility for acts of third parties, see section III.C.4 of Preamble below.

(4) Off-site Crime by Family Members. In some circumstances, off-site criminal acitvity by family members is a proper ground for termination of tenancy. First, off-site crime by a public housing resident may directly affect the public housing project, and the lives of other project residents. For example, a tenant may sell narotics to another tenant. The effect on the purchaser and the project is substantively the same if the transaction takes place on project property or across the street. To protect public housing projects from criminal activity, serious criminal activity should not be insulated from contractual sanction because of a technicality—that the criminal act or transaction took place over the project boundary.

Second, off-site crime is a basis for termination and eviction because the pattern of off-site behavior may be extended to the project, and is therefore a legitimate management concern of the PHA. At the point of admission, PHAs are authorized to bar admission of applicants whose habits and practices are expected to have a detrimental effect on the project (§ 960.204(b)(2)). The PHA may consider a history of criminal activity involving crimes of physical violence to persons or property (§ 960.205(b)(3)). The logic behind these concerns at the point of admission applies equal to criminal activity by members of families already admitted to the project.

In addition to the broad prohibition of on-site crime by family members or guests, the final rule adds a new provision (§ 966.10(i)(1)) authorizing the PHA to include a lease provision allowing eviction of a family for two categories of on-site or off-site criminal activity by a family member: (1) "a crime of physical violence to persons or property" or (2) "illegal use, sale or distribution of narcotics." At the election of the PHA, the lease may provide that such criminal activity by a family member—on or off the premises—is a violation of the lease, or is other good cause for termination of tenancy.

(5) Relation Between Eviction and Criminal Prosecution. PHA comment states that if a family member commits a crime the PHA should be able to terminate the tenancy before a conviction in the criminal prosecution. If not, the criminal can continue to prey on other tenants. Other comment objects to eviction for criminal acts when no arrest or conviction has yet occured.

The final rule adds a new provision (§ 966.10(i)(2)) which confirms (as stated in the Preamble to the proposed rule, 51 FR 26506, col. 3) that a PHA may terminate tenancy and evict the family for criminal activity "before or after conviction of the crime". The PHA may evict for violation of the required lease prohibition concerning on-site crime by a family or its guests, or for violation of an optional lease provision allowing termination for off-site crime (narcotic violation or crime of violence). Comment asks for confirmation in the rule text and lease that the PHA may evict for criminal activity irrespective of the existence or stage of a criminal prosecution for the criminal act.

If criminal acts are grounds for termination of tenancy, the PHA does not have to delay going forward with a civil proceeding for termination of tenancy and eviction pending the progress of a criminal prosecution relating to the same set of facts. The PHA may proceed with a civil action to terminate tenancy, and may evict the family because of criminal behavior by family members, regardless of whether a prosecution has commenced, and regardless of the stage of a criminal proceeding. Of course, the tenant is entitled to a fair hearing on the existence of grounds for termination of tenancy, in the PHA's administrative grievance procedure, or in the judicial action for eviction.

In a criminal prosecution, court decision may lead to imprisonment or other criminal penalty, and the elements of the crime must be proved by a criminal standard of proof. However, eviction of a public housing tenant is a civil remedy (§ 966.23(a)). Decision of the court in the action for dispossession of the tenant may lead to eviction from the unit. If the PHA alleges that commission of a "crime" by a household member is a lease violation or other good cause for termination of tenancy, then the PHA must prove the elements of crime by the civil standard of proof used in an eviction proceeding (generally by a preponderance of the evidence). There is no injustice or denial of proper process by allowing the PHA to proceed with civil eviction before conviction of the crime.

3. Prohibited Conduct or Use of Unit

a. Damage or Destruction. The final rule provides (§ 966.10(h)(2)(ii)) that the tenant and other members of the household:

> shall not damage or destroy the dwelling unit or premises, and shall prevent such damage or destruction by guests, visitors, or other persons under control of Household members.

Destruction of property by the tenant, family or guests is expensive for the PHA, and may lead to destruction of the project as a decent place to live. The tenant's duty to avoid destructive behavior must be clearly stated in the public housing lease.

b. Disturbance of Other Residents. The final rule provides (§ 966.10(h)(2)(i)) that the tenant and other members of the household:

> shall not disturb other residents, and shall prevent disturbance of other residents by guests, visitors, or other persons under control of Household members.

In the proposed rule, the prohibition against disturbing other project residents was combined with language which prohibits unlawful activities in the unit or project. For clarity, and for separate emphasis of each theme, the subjects are treated in separate paragraphs of the final rule. The duty to avoid disturbance of other residents is more simply stated.

4. Responsibility of Tenant for Acts of Third Parties

This section discusses when the tenant is responsible for disturbance, damage or crime by persons other than members of the household.

Comment states that the family should be responsible for conduct of any third party in the unit. Comment states that in most cases where a third party damages property, disturbs the neighbors or commits illegal acts, the tenant is an accessory, not an innocent bystander. Almost all burglary and vandalism is by persons invited by the family. Other comment states that the tenant should not be responsible for third party acts if the tenant exercised reasonable care to prevent harm or injury. Comment states that the tenant should not be treated as a guarantor of conduct by third persons on the premises (e.g., the pizza delivery man). The tenant should only be responsible for actions which are under the control of the family.

The old rule provides that the tenant must "cause his guests" to refrain from damaging the unit or project (old rule § 966.1(f)(9)), and must "cause other persons who are on the premises with his consent" not to disturb peaceful enjoyment by neighbors (§ 966.1(f)(11)). Under the old rule, the prohibition of illegal acts by the tenant (§ 966.1(f)(12)) does not refer to commission of illegal acts by third parties.

Thus the old rule does not contain a single consistent formulation of the tenant's responsibility for third party acts. Under the old rule, the tenant is not answerable for illegal acts by third parties, but has a positive obligation to "cause" third parties to act in a way that avoids damage or disturbance. In the latter case, there are different regulatory descriptions of the class of third party actors for whom the tenant is responsible.

In the proposed rule, HUD offered a new formulation of the PHA responsibility for third party acts. The proposed language was based on language of the multifamily model lease (used for some of the non-public housing project-based subsidy programs). Under the proposed lease language, the family may not engage in or "permit" disturbance or unlawful acts. This provision was intended to make the tenant responsible for acts or damage by family guests or persons under control of the family (51 FR 26507, July 23, 1986).

Language of the proposed rule would change the tenant obligation from a responsibility to "cause" appropriate behavior by third parties under the old rule lease, to an obligation not to "permit" injurious acts. Legal aid comment states that the proposed change is an improvement over the old rule. The tenant is often unable to control third party acts. However, the comment also notes concern that the word "permit" is vague and ambiguous.

Comment objects to the proposed change based on the multifamily model lease. A comment states that the change from "cause" to "permit" will do immeasurable harm to a PHA which is attempting to maintain the project as safe place to live for all residents. The tenant should be responsible for all actions by guests or members of the family. The tenant should have to face the consequences of unruly behavior by family members and guests without necessity for the PHA to prove active permission by the tenant. The comment states that under the proposed language, the resident will be able to "passively condone" third party acts which distrupt the community, and the PHA has to show that the tenant actively allowed the guest to engage in prohibited activity.

The final rule contains a single uniform formulation of the tenant's contractual responsibility for third party acts. The tenant and other members of the household must "prevent" disturbance, damage or illegal acts by "guests, visitors, or other persons under control of Household members" (§ 966.10(h)(2) (i), (ii) and (iii)). The tenant has a positive duty to "prevent" the prohibited activities by third parties. The tenant does not escape responsibility if the tenant and household passively condone prohibited acts. Instead, the tenant and household must do what is necessary to "prevent" the prohibited acts.

The tenant's duty applies to actions by guests, visitors or other persons under control of household members. HUD does not accept the view that the tenant should be responsible for any third party act that occurs in the family unit. The tenant should only be responsible for acts by guests or visitors (i.e., persons who enter the unit with the consent of the household), or by other persons under control of the household. The tenant is not responsible for acts by persons who enter the unit without consent, and who are not under control of household members. Liability for acts of guests or visitors, and for other persons under family control, is a stimulus to encourage the tenant and other family members to be more careful in admitting guests, and induce the family to exercise control over other third parties in the unit. Conversely, liability for acts by third parties whom the family is unable to control may produce a sense of hopelessness and frustration. Third parties may break into the unit. The tenant should not be held answerable under the lease for crimes committed against the family.

D. Guests

The rule provides (§ 966.10(g)(3)) that:

> members of the Household may receive guests or visitors in the dwelling unit. However, such use of the dwelling unit by the Household must be reasonable.

This language is substantially a restatement of the old rule provision that tenant's right to use and occupancy includes "reasonable accommodation" of guests or visitors.

Comment states that a requirement to register guests with the PHA should be prohibited as an invasion of tenant privacy. The PHA has no right to interfere if a person in the unit is a guest rather than an unregistered tenant. Other comment states that guest rules should be left to discretion of the PHA. The PHA should have authority to require registration of guests. Registration is not a hardship for the tenant or the family. Registration of guests helps the PHA deal with the problem of unauthorized occupancy. When the guest registers, the PHA can inform guests about PHA rules and regulations for visitors.

The final rule does not prohibit PHAs from requiring registration of guests or visitors. The rule does not contain any explicit provision concerning PHA registration requirements.

HUD believes that the regulatory lease requirement to use the unit for residence by the household (see §§ 966.10(b)(1), 966.10(g)(1) and 966.10(h)(1)(1)), and the provision for "reasonable" use for guests or visitors of the household (§ 966.10(g)(3)), sufficiently cover the Federal interest that the unit be used only for residence by a lower income family, in accordance with the purpose of the statute.

More detailed regulation of the presence of family guests is most appropriately left to the judgment of the PHA, which may utilize lease provisions or house rules which further regulate the presence of guests or visitors in a public housing unit.

E. Fraud

In the lease, the tenant agrees that the tenant and other members of the household "shall not commit any fraud in connection with any Federal housing assistance program" (§ 966.10(h)(2)(v)). This provision, which is contained in the proposed and the final rule, concerns future fraud by unit occupants. Violation of tenant's promise is a violation of the lease, and is ground for termination of tenancy.

The final rule adds a new separate lease provision to cover past fraud by unit occupants. The final rule is broadened to explicitly cover fraud committed by family members before execution of the public housing lease, or before the PHA approves occupancy by a new family member. Absent this change in the rule, there might be question whether the PHA could terminate the tenancy for past family fraud in the Federal housing assistance programs. The final rule provides (§ 966.10(h)(3)(i)) that the lease must include a certification by the tenant that:

> The Tenant and other members of the Household have not committed any fraud in connection with any Federal housing assistance program, unless any such fraud was fully disclosed to the PHA before execution of the lease, or before PHA approval for occupancy of the unit by the Household member.

The PHA may find out about past fraud after lease execution, or after the PHA approves occupancy by a new family member. For example, the PHA may learn that the tenant deliberately concealed family income in order to gain admission to the PHA's program. To prevent and punish program fraud, the PHA must have a contractual basis to terminate tenancy when fraud is revealed.

The requirement for the tenant to certify to the absence of past fraud by household members permits the PHA to terminate tenancy if the certification is false. The certification requirement is also designed to give tenant some incentive for full advance disclosure to the PHA. If the tenant fully discloses past fraud before execution of the lease, the existence of such past fraud is not a breach of tenant's certification under the lease. When tenant makes advance disclosure of fraud, the PHA can make an informed case-by-case judgment of the appropriate action (for example, by requiring the tenant to enter into an agreement to repay section 8 assistance paid as a result of tenant fraud).

The lease provisions governing past or prospective fraud by the unit occupants (§ 966.10(h)(2)(v) and 966.10(h)(3)(i)) only deal with fraud committed in connection with a "Federal housing assistance program", such as section 8 or public housing. The requirements do not concern fraud unrelated to a Federal housing assistance program. However, the prohibition of housing fraud is not limited to fraud related to the public housing program, or acts to defraud the particular PHA which enters the lease. For example, the lease provisions would cover a fraudulent representation of family income in order to secure admission to the section 8 certificate program of the same PHA or another PHA. The provisions reflect the Federal interest, and HUD's particuler role, in preventing and pursuing fraud in any Federal housing assistance program. Fraud wastes Federal housing subsidy dollars, and denies scarce housing assistance for eligible families.

The provision covers fraud by any member of the household—the whole group of persons living in the unit with approval of the PHA. The commission of fraud by any member of the family violates the lease, and is ground for termination of tenancy.

The final rule adds an explicit definition of the term "fraud" as used in the lease (§ 966.2). As used in this rule, the term "fraud" includes "fraud as defined under any Federal or State civil or criminal statute". In addition, "fraud" for purpose of this rule is defined to include any other "deliberate misrepresentation to the PHA by the Tenant or other members of the Household".

The regulatory definition of fraud thus embraces the full spectrum of behavior which is treated as fraud under State or Federal law, and whether for civil or criminal purposes. The rule expresses a strong objective of strengthening the hand of the PHA in dealing with behavior defined as fraudulent under Federal law, or under State law in the State where the project is located. The PHA has the assurance that fraudulent actions proscribed by civil or criminal law are grounds for action by the PHA against the tenant under the lease. The PHA has therefore the strongest possible contractual basis to deter family fraud, and to take appropriate action if fraud is revealed. The rule provisions are intended to minimize diversion of Federal housing subsidy resources because of fraudulent misrepresentation.

Comment recommends that the rule prohibit fraud "or misrepresentation" in connection with the programs. As indicated above, the regulatory definition of fraud in the final rule includes intentional deception by "misrepresentation" to the PHA. Misrepresentation is the crux of the concept of fraud. The definition will broadly cover deliberate factual misrepresentation by family members, even if the type of misrepresentation is not otherwise called or treated as "fraud" under Federal or State law.

Public comment supports the prohibition of fraud in connection with Federal housing assistance programs.

F. Use of Dwelling

1. For Members of Household

The names of the tenant and of the other persons who will live in the dwelling unit are stated in the lease (§ 966.10(b)(1)). The only individuals who may live in the unit are the persons who are specifically approved by the PHA for residence in the unit (see § 966.10(h)(1)(i)(A)).

The final rule contains a new definition of the term "Household" (§ 966.2). The "Household" consists of the tenant and other persons who live in the dwelling unit with written approval of the PHA. In the proposed rule, a similar notion was conveyed in a definition of the term "family". However, as generally used in public housing regulations and practice, the term "family" denotes the individual or group of individuals who are eligible for public housing or section 8 assistance under the 1937 Act (see U.S. Housing Act of 1937, section 3, 42 U.S.C. 1437a; 24 CFR Part 912). In two cases (foster children and live-in care attendants), occupants of a public housing unit may include an individual who is not a member of an eligible statutory "family". To avoid confusion, it is therefore helpful to use the separate term "Household" to denote the whole body of authorized unit occupants, including any persons who are not members of the statutory family.

The lease must provide that the Tenant has the right "to exclusive use of the dwelling unit for residence by the Household (§ 966.10(g)(1)). The lease may also provide that with written approval of the PHA, use of the unit may include care of foster children and live-in care of a member of the family (§ 966.10(g)(2)).

The requirement for PHA approval of all unit occupants serves a two-fold purpose: Enforcement of statutory requirements related to unit occupancy, and the PHA management interest in controlling occupancy of the unit.

In public housing, the unit must be occupied by a "family". In applying this statutory requirement, the PHA has broad authority to determine whether a group of individuals constitutes a statutory "family" which is eligible for assistance in a public housing unit. To perform this function, the PHA must control both the initial occupancy of the unit, and the addition of new family members. In addition, the amount of a tenant's rent is determined by a statutory formula, and is based on the amount of family income. To enforce the statutory procedures for computation of the rent, the PHA needs to know when new members are added to the family, so that new member income is counted in the computation of family rent.

The PHA has a strong management interest in controlling occupancy of the unit. The PHA has the right to decide who is admitted to the housing, to assure that the sequence of admission is fair and consistent, to limit density of occupancy in the unit and project, and to assure that unit occupancy accords with PHA tenant selection criteria (§ 960.204). The PHA interest in maintaining control over unit occupancy applies to changes in composition of the family unit, just as to initial admission of the family. For example, the PHA has a continuing interest in preventing occupancy by persons with a history of criminal activity involving crimes of physical violence (cf., § 960.205(b)(3)).

Comment advises that the PHA authority to limit admission of new family members should be limited. The comment suggests that a tenant should not always be required to secure PHA approval for unit occupancy by an additional person. Where PHA approval is required, the rule should provide that PHA consent may not be unreasonably withheld. In particular, the comment states that the rule should provide that the consent for occupancy by a foster child or live-in care of a family member may not be unreasonably withheld.

The recommendations in this comment are not adopted. The PHA's authority to decide who may occupy a public housing unit should not be weakened. For some PHAs, illegal occupancy of public housing units is a massive problem. Failure to control unit occupancy produces a decay in the conditions of project life, including the growth of narcotics use and other criminal activity.

The requirement for a tenant to seek PHA approval of each new unit occupant is reasonable. Consideration of tenant requests is properly addressed to the management discretion of the PHA. All PHA action is subject to the normal judicial standards for review of official action under State law, such as a prohibition of action which is arbitrary or capricious. HUD has no reason to impose a special contractual standard governing a PHA decision to deny approval of a new unit occupant. A provision that approval may not be "unreasonably withheld" may be construed restrictively, in a way that prevents the PHA from making a legitimate and well-founded determination to refuse approval of a new unit occupant.

It should be noted that the rule does not state that the tenant must always obtain PHA approval before the new occupant moves into the unit. In some cases, advance approval is not practicable or possible. A family member may turn up suddenly, in need of immediate shelter. The PHA may need a few days to process a request for approval of the new unit occupant. Thus the PHA may establish rules concerning the procedures and timetable for securing PHA approval for occupancy by a new family member.

2. Use As Household Residence

The proposed rule provided that the family must use the dwelling unit as the family's "principal" place of residence. Comment recommends that the rule should obligate the tenant to use the public housing dwelling unit as the family's "only" place of residence. The comment remarks that HUD should not subsidize a family or individual with another residence, or a vacation home.

The change is made as recommended. The revised rule provides (§ 966.10(h)(1)(i)) that the tenant:

> shall use the dwelling unit (A) solely for residence by the Household, and (B) as the Tenant's only place of residence.

3. Incidental Business Use

The purpose of public housing is to provide housing for poor families. However, the Department has long asserted that some incidental use of a public dwelling unit for profit-making purposes may be consistent with the primary use of the unit as a family residence in accordance with the statute. For example, the family may earn money by babysitting, care of a foster child, or envelope-stuffing. Family income from profit-making activities in the unit can be an important source of self-support by the family.

The final rule adds a new provision to clarify that the requirement to use the unit exclusively for residence by the family does not mean that the family members are always barred from any gainful activity in the dwelling unit (§ 966.10(g)(1)):

> The lease may provide that with written approval of the PHA, members of the Household may engage in legal profit-making activities incidental to primary use of the dwelling unit for residence by the Household.

The rule also provides (§ 966.10(h)(1)(i)) that although the dwelling unit may only be used for residence by members of the household:

> if approved by the PHA under the lease, members of the Household may engage in incidental profit-making activities [in the dwelling unit].

The new provisions codify the authority for incidental profit-making activities in the dwelling unit.

The regulation does not, however, authorize the conversion of a public housing dwelling unit to a business use, e.g., by changing an apartment to a store or office. The business activity must not prevent the family from living in the unit. The unit must remain as the actual residence of the family members, and the profit making activity must be "incidental" to the primary residential use. HUD recognizes that in marginal cases the determination of what kinds of activities can be permitted, and to what extent, may be difficult, and will require case-by-case determination. In the first instance, it is the responsibility of the PHA to make this determination.

Under the rule, the PHA is not required to permit gainful activity in the dwelling unit by members of the assisted family. The lease "may provide" for such incidental activity if the PHA chooses to incorporate provision for such activity in the lease. If the PHA elects to allow such activity, the household members may only engage in such activity "with written approval of the PHA". The requirement for PHA approval is intended to assure that the PHA retains necessary contractual control over activities which depart from the basic residential use of the unit, which may affect living conditions for other building residents (e.g., because of noise or traffic), and which may affect physical condition and maintenance of the dwelling unit.

Finally it is important to note that the lease may only authorize use of the unit for "legal" profit making activities by household members, and that under the lease members of the household may not engage in criminal activity in the unit, and must prevent criminal activity by guests or visitors (§ 966.10(h)(2)(iii)).

G. Rent and Charges

1. Determination of Rent

a. Amount of Rent. The required lease provisions state that the rent payable by the tenant is an amount determined by the PHA in accordance with HUD regulations and other requirements, and in accordance with PHA policy (§ 966.10(c)(1)). The rule also adds definitions of "Tenant Rent" and "Total Tenant Payment" (§ 966.2). These terms are defined to conform with the definitions and rent determination procedure under the rule on rent calculation procedures in the public housing program (24 CFR Part 913).

PHA rent determinations are largely controlled by HUD procedures which implement the statutory rental formula (see 24 CFR Part 913). Statutory and regulatory rent requirements may change from time to time. The terms of the lease between the tenant and the PHA permit necessary adjustments in the amount of tenant rent because of statutory and regulatory changes. The final rule specifies that the changes must be implemented in accordance with PHA policy, rather than as ad hoc determinations for each tenant.

b. Notice of Rent. The rule provides that any change in the amount of the tenant rent must be stated in a written notice by the PHA to the tenant (§ 966.10(c)(2)). The notice must state the new amount of rent, and the effective date of the change. The notice must also state that the tenant may ask for an explanation of how the rent is computed by the PHA. If the tenant asks for an explanation, the PHA must answer the request in a reasonable time.

The PHA must give a tenant the opportunity for an administrative grievance hearing on a proposed "adverse action". The PHA's proposed decision determining the amount of the tenant rent is a proposed "adverse action" (§ 966.31(a)(2)(iii)(A)). The tenant may ask the PHA for an explanation of the proposed decision (§ 966.10(c)(2)). If the tenant does not agree that the PHA rent determination complies with HUD regulations, the tenant may ask the PHA to change the rent. If the PHA denies the tenant's request to change the proposed determination of tenant rent, the PHA must give the tenant notice of the reasons for the proposed decision, and of the opportunity for an informal hearing (§§ 966.31(b)(1) and 966.31(b)(2)(iii)).

Comment states that the PHA notice of the new rent amount should set out how the rent was calculated, so that the tenant can detect a miscalculation. By giving the calculation, the PHA may reduce the number of explanations needed.

The suggestion is not adopted. Some PHAs may find it helpful to include a statement of the rent calculation with the notice of the new rent amount. This procedure may minimize the number of cases in which tenants need further explanation, and may tend to minimize disputes and the need for grievance hearings over the PHA rent computation. However, other PHAs may find that other techniques are more efficient or informative to let tenants know how the rent is computed, and to avoid unnecessary disputes over the rent.

The PHA may prefer to give the tenant information and explanations on how the rent is computed when the tenant submits the reexamination information; for example, in an interview with the tenant at the time of reexamination. The PHA may conclude that the bare statement of the rent calculation is not helpful, or is more likely to lead to confusion than understanding. HUD does not have a sufficient basis to impose on all PHAs a requirement for routine inclusion of the rent calculation procedure in the PHA rent notice.

2. Interim Reexamination

a. Rent increase. Incomes of all tenants must be reexamined at least annually (U.S. Housing Act of 1937, section 3(a), 42 U.S.C. 1437a(a); 24 CFR 960.209(a)). Comment suggests that the Department should prohibit upward revisions of rent as a result of an interim reexamination (i.e., an examination of family income between regular annual examinations).

The Department has not accepted this suggestion. Most reexaminations are conducted on an annual basis, but there is no reason to prohibit the PHA from adjusting rent on the basis of more current information. The statute only requires that reexaminations are conducted "at least" annually, but does not preclude reexamination at shorter intervals, or adjustments of tenant rent to reflect an earlier reexamination.

The Preamble to the rule governing rent and income reexaminations in the public housing program states that:

> * * * some PHAs need the flexibility to conduct reexaminations more frequently than annually under procedures now provided in HUD handbooks. For example, earlier recertifications are appropriate if the PHA has performed a tenant-requested reexamination for a change in circumstances that is found to have been temporary. (24 CFR Part 913, 49 FR 21476, 21480–81, May 21, 1984.)

PHA comment on the instant rulemaking agrees that PHAs need flexibility to conduct examinations of family income more often than annually.

b. Rent Decrease. Comment states that there should be a reexamination and consequent reduction of rent when there is a decrease of family income, or a change in other factors which would result in a reduction of rent (such as unanticipated medical expense for the elderly) between annual reexaminations. PHA refusal to perform an interim examination for a family with a substantial income loss causes eviction and suffering. PHAs should be encouraged to reduce rents as soon as feasible. Comment recommends that if a tenant reports an income decrease, or other facts which would justify a downward adjustment of the rent, the rent should be adjusted for the month after such report.

Comment argues that the lease should state the conditions when the PHA must perform an interim reexamination for decreases in family income. Section 960.209(b) provides that if the PHA receives information on changes in family income or other circumstances between regularly scheduled reexamination, the PHA must "make any adjustments determined to be appropriate". Comment states that since rent is a basic element of the lease, the tenant should be told that the tenant is entitled to an interim reexamination.

In this rulemaking, HUD has not made, and did not propose, any substantive change in HUD requirements for reexamination of family income or determination of tenant rent. Those requirements are outside the framework and function of the lease and grievance rule, and are not the subject of this rulemaking. The lease requirements in the present rule are only intended to provide the contractual framework for enforcement of HUD rent determination procedures, including requirements regarding reexamination of family income.

HUD will not add new requirements for the PHA to adjust rent payments because of changes in family circumstances between annual reexaminations, and will not require that the lease state the basis for conducting an interim reexamination of family income. Under the present governing regulation (§ 960.209(b)) the PHA must make adjustments "determined to be appropriate" because of a change in family income or other circumstances between regular annual reexaminations. The PHA has the authority and responsibility to determine what adjustments are "appropriate" in different circumstances. The regulation does not require an automatic adjustment of rent for changes in family circumstances. The PHA is expected to devise policies for appropriate response, by interim reexamination and adjustment of rent, to unanticipated changes of income and family composition. The statute does not require that the PHA conduct an interim reexamination. The PHA is only required to conduct a reexamination "at least annually" (U.S. Housing Act of 1937, section 3(a), 42 U.S.C. 1437a(a)).

3. Items Included In Rent

The amount of rent paid by a public housing tenant is set by Federal law (U.S. Housing Act of 1937, section 3(a), 42 U.S.C. 1437a(a)). For most tenants, the rent is 30 per cent of adjusted income. The PHA may not increase the rent over the statutory formula amount, but may charge the tenant for items in addition to rent.

Rent includes service and maintenance needed to keep the housing in decent, safe and sanitary condition. Under HUD administrative implementation of the statutory rent limitation, rent also includes a reasonable allowance for consumption of utilities. Under the required lease provisions, the lease must state the utilities, and the services, maintenance, equipment and appliances, which are included in the rent, and are furnished by the PHA without additional charge to the tenant (§§ 966.10(c)(3) and 966.10(d)(1)).

Utilities may be paid directly by the tenant to the utility supplier or may be paid by the PHA. If the tenant pays for the utility, an allowance for the tenant utility cost is deducted from the rent which must be paid to the PHA (called "tenant rent", definition at § 966.2). If the utility is paid by the PHA, an allowance for reasonable consumption of the utility is included in the rent. If consumption of PHA-paid utilities is measured by an individual checkmeter, the PHA may bill the tenant for consumption in excess of the allowance (§ 966.10(d)(3)(ii)).

Comment recommends requiring a PHA to furnish utilities. This recommendation is not adopted. The factors which determine the mix of utility supplies for the unit (what utilities, and whether the utilities are paid by the tenant or the PHA), and the technical procedures for determination of PHA-wide utility allowances in accordance with HUD requirements, are determined outside of the lease. However, the lease should state what utilities are paid by the PHA, and what utilities are paid for by the tenant. In addition, the tenant needs to know the amount of any allowance for tenant-paid or PHA-paid utilities. The lease states the mix of tenant and PHA paid utilities for the unit, and the lease also requires notice of applicable allowances for PHA-paid or tenant-paid utilities (§ 966.10(d)(5)). In the final rule, treatment of utility costs and rent is expanded and clarified (and is consolidated in § 966.10(d)).

The rule provides that the lease must state what utilities are included in the tenant rent, and are supplied without additional charge to the tenant (called "PHA-furnished utilities") (§ 966.10(d)(1)). The final rule also adds a new parallel provision governing treatment of utilities paid by the tenant. The rule provides that the lease must state what utilities are not included in the tenant rent, and must be purchased by the tenant from the utility suppliers (called "Tenant-purchased utilities") (§ 966.10(d)(2)).

The final rule includes parallel provisions that allowances for PHA-furnished utilities (§ 966.10(d)(3)(i)) and for tenant-purchased utilities (§ 966.10(d)(4)(i)) must be determined in accordance with HUD regulations and requirements. The rule also includes a provision (carried forward without change from the old rule) that surcharges for excess consumption of PHA-furnished utilities are only allowed if the charges are determined by an individual checkmeter for the unit (§ 966.10(d)(3)(ii)).

The final rule includes a new provision for notice and change of utility allowances under the lease (§ 966.10(d)(5)). The PHA must give notice to the tenant of any applicable allowance for PHA-furnished or tenant-purchased utilities. The PHA may change the allowance at any time during the term of the lease, and must give the tenant written notice of the revised allowance.

4. PHA Charges In Addition to Rent

a. Authority for charges. The final rule provides (§ 966.10(e)(1)):

> (i) The lease shall state what types of charges the Tenant is required to pay the PHA in addition to Tenant Rent. The lease shall state how the charges will be determined by the PHA (for example, by a schedule of surcharges for excess consumption of utilities, or by a schedule of repair charges). The PHA's schedules or other procedures for determining Tenant charges shall be made available for inspection and copying by the Tenant.
>
> (ii) The PHA shall give the Tenant written notice of any charge in addition to rent, and of when the charge is due * * *
>
> (iii) The lease may require the Tenant to pay reasonable charges, as determined by the PHA, for damage other than normal wear or tear, caused by Household members, or by guests, visitors, or other persons under control of Household members.

These provisions are intended to provide a foundation for assessment of PHA charges *in addition to rent.* Comment states that PHA charges in excess of the statutory public housing rent are illegal if the charges are (1) for necessary services, or (2) are for non-essential facilities or services, but are mandatory. Comment asks who is responsible for assuring that a public housing tenant is not paying more than the statutory rent.

Charges for excess utility consumption, or for damages to the unit, are the most important types of non-rent charges. PHA surcharges for excess consumption of utilities are not included in the rent, nor are charges for damages caused by the family or its guests. In addition, the PHA may levy other types of charges, if the charges are not in the nature of rent. In recent cases, courts have held that a tenant may be required to pay for mandatory services not included in the rent. (These cases upheld mandatory meal charges in the section 8 program under the U.S. Housing Act of 1937, where tenants are subject to the same statutory rent limit as in public housing.) The present rule does not amend or in any way affect the operation of the rule on computation of public housing rent (24 CFR Part 913). Further, the rule does not define what types of charges are not included in rent, and may therefore be imposed outside of the statutory limit on public housing rent.

In the first instance, it is the responsibility of the PHA to determine what must be included in the rent, and what charges may be levied by the PHA in addition to tenant rent. If the tenant does not agree with the PHA decision to levy a charge in addition to rent, the tenant may ask for a hearing under the PHA grievance procedure. A challenge to the validity of the PHA charge may also be raised as a defense by tenant if the PHA brings a court action to evict the family for non-payment of the charge.

A PHA recommends deletion of provision that PHA charges are "in addition to rent", so that the additional charges may be collected as rent in a summary nonpayment proceeding. This recommendation is not accepted. As a matter of Federal law, PHA additional charges are not part of the rent subject to the Federal statutory rent limitation. The fact that the special charges do not constitute rent for this Federal purpose is the legal basis which permits imposition of the charges.

This rule does not seek to determine the appropriate State court or proceeding for collection of PHA charges. The procedures and proper forum for collection of rent or charges in State court are determined by State law. State law may permit the collection of rent and charges in a single proceeding or in separate proceedings. A State court will determine as a matter of State law whether the court has jurisdiction to adjudicate issues concerning additional non-rent charges in a proceeding to evict for non-payment of "rent", and whether additional charges are included in "rent" for the purpose of the State statutes or rules governing jurisdiction of the court. This jurisdictional question is wholly distinct from the Federal question of what constitutes rent for purpose of applying the Federal statutory limit on rent payable by a public housing tenant.

Some comment supports promulgation of HUD's proposed provision to provide for charges in addition to rent. Comment recommends various technical revisions of the proposed language.

b. Charge for Damages. The proposed rule stated that a tenant "may" be required to pay PHA charges for damages to the unit. Comment states that the rule should say that the tenant "shall" be required to pay the PHA charges, presumably to clarify that payment of the charges is mandatory. The final rule provides that the lease must state what charges the tenant "is required" to pay in addition to the tenant rent (§ 966.10(e)(1)(i)). Payment of the charges is mandatory. The PHA is responsible for drafting appropriate lease language under the rule, and may craft lease language which will unambiguously express the duty of the tenant to pay charges in addition to rent.

The proposed rule stated that the tenant may be required to pay charges for "maintenance" beyond normal wear and tear. Comment states that the PHA should only charge the tenant for "damage" beyond normal wear and tear. "Maintenance" is necessary to counteract normal wear and tear. The authority to charge for "maintenance" opens doors to inappropriate and punitive charges.

HUD notes that the proposed language was not intended to cover charges for maintenance needed to correct the effects of time and ordinary use, but to allow the PHA to collect charges for harm to the unit that results from negligent or abusive use. As suggested by the comments, this idea is more accurately expressed by referring to charges for "damage" to the unit. The final rule provides that the tenant must pay reasonable charges, as determined by the PHA, for "damage other than normal wear and tear" (§ 966.10(e)(1)(iii)).

Comment states that the tenant should only be responsible for damage caused by persons under the family's control. A tentant should not be responsible for damage caused by vandals or burglars. The final rule states that the lease may provide that the tenant must pay charges for damages "caused by Household members, or by guests, visitors, or other persons under control of Household members" (§ 966.10(e)(1)(iii)).

PHA comment criticizes a requirement that the damages charged to the tenant must be "caused" by the family or its guests. The comment asserts that the rule would place on the PHA the burden of showing who caused the damage. All unit damage beyond normal wear and tear (such as torn screens, broken windows, damaged doors or graffiti) should be charged to the tenant. The comment states that the PHA is not able to establish who caused the damage, or whether the person is a family guest. The determination whether the tenant is required to pay for damage should not be based on who caused the damage. However, charges for damages in common areas should be based on evidence of who caused the damage.

Providing who caused damage is a hard problem, especially for damage inside the unit. After the fact, the PHA can show the damage, but usually has no direct evidence who caused the damage. The family lives in the unit, and is in a better position to know what happened. However, damage in the unit is not always caused by the family or its guests. Damage may be caused by a storm, by a thief, or by a damage source outside the unit (such as a burst pipe in an upstairs unit). Damage inside the unit may sometimes occur because the PHA has not performed some contractual obligation, for example, water damage because the PHA fails to fix the plumbing; fire damage because the PHA does not install a fire detector required by State law.

Although there are difficult problems of proof, the allocation of responsibility to pay for damage should depend on who caused the damage. The tenant should pay for damage caused by the family. PHA charges for family-caused damages, or the possibility of eviction because of such damages, are an inducement to correct family behavior. On the other hand, if damage is not caused by the family, the family may not have the power to avoid the damage. Charges against the tenant for damages that are not caused by the family are more likely to create a sense of helplessness and resentment, than to produce a salutary correction of family behavior.

Analysis of this problem should distinguish between the tenant's ultimate responsibliity for family-caused damage, and the technique for proving who caused the damage (in the PHA's administrative procedures leading to initial determination of the charge, in the PHA grievance procedure, or in court). The damage provision in this rule only purports to determine the ultimate allocation of responsibility for damage to the unit. The lease may require the tenant to pay charges for damages caused by the family. However, the rule does not state what property has the burden of proving who caused damage to the unit, and does not state how the fact of causation is to be proved.

In the State landlord tenant-court, procedures to prove causation are governed by State law. In proving causation, proof that there is damage to the unit and that the family has possession of the unit may constitute adequate circumstantial evidence to support a finding that the damage was caused by the family. The requirements for proving causation by family members may be affected by provisions of the lease form drafted by the PHA. If permitted by State law, the lease could provide that the tenant is responsible for interior damage beyond normal wear and tear unless the tenant can prove that the damage was caused by persons not on the premises with consent of the family, or was caused by some other factor not attributable to the tenant. The PHA grievance procedure may contain provisions which regulate the burden of proof in the administrative hearing, or the procedures for proving in the hearing who caused the damage to the unit.

c. Notice of Charges; When Charges Are Due. The new rule provides (§ 966.10(e)(1)(ii)):

> The PHA shall give the Tenant written notice of the amount of any charge in addition to Tenant Rent, and of when the charge is due.

The old rule provided that a charge for tenant damage or for excess consumption of PHA-furnished utilities is not due until the second month after the charge is incurred. For example, a charge posted on January 1 could not be collected until March. In the 1986 proposed rule, HUD proposed to eliminate this restriction on when charges in addition to rent may be collected, and to require instead that the PHA must give "reasonable notice" of such charges.

PHA comment approves this proposed change. The PHA should not have to wait to the second month after a cost is incurred. The old rule restriction causes delay in the process for eviction of a tenant. It the charges are not paid when due (at the beginning of the second month after the month when the charge is incurred), the PHA must then give another 30 days notice of termination of the lease. The old restriction is also confusing for tenants. Removal of the restriction gives the PHA increased flexibility for faster collection of charges in addition to rent. PHA comment suggests that charges should be due at the first of the month after work is done.

Legal aid comment objects to changing the old restriction. If allowed flexibility, the PHA may set short periods for notice and payment of charges, and enforce the requirements unevenly. The question of whether the PHA has given "reasonable" notice will be subject to litigation. Comment states that under the present rule may PHAs bill quarterly for utility surcharges. This practice ensures eviction of the most vulnerable, who don't have time to raise the money.

PHA comment objects to the proposed requirement for PHA to give notice of any charges when due. The PHA statement of charges is included in the monthly rent statement. The PHA should not be required to give advance notice of the charge prior to the monthly billing.

The new rule does not require any fixed delay in collection of charges levied by the PHA. The new provision provides simply that the PHA must give the tenant written notice of the amount of the charge, and when the charge is due. To pay the charge, or to request a grievance on the charge, the tenant has to know that the PHA has levied a charge, how much and when due. The rule does not state that the notice must be "reasonable". However, the rule allows the PHA to assess "reasonable fees" for late payment of rent or charges determined by the PHA (§ 966.10(e)(2)).

The PHA should have clear administrative discretion to decide when charges are payable by the tenant under the lease. Different procedures may be appropriate for different types of charges, or because of different family circumstances. In some cases, the PHA may wish to bill for charges as soon as the amount can be determined, for example, to collect damage for destructive behavior by the family. In other cases, the PHA may wish to spread payment over a period of time, to facilitate payment by the tenant, for example, surcharges for excess consuption of PHA-furnished utilities. Examination of the public comments suggests that the proposed provision for "reasonable" notice of charges in addition to rent is likely to be a source of confusion and unnecessary litigation, and may be applied in a way that undesirably limits the ability of the PHA to develop a scheme for assessment of charges other than rent.

d. Legal Fees and Charges. The rule provides (§ 966.11(h)) that the lease may not include:

> [an] agreement by the Tenant to pay lawyer's fees or other legal costs even if the Tenant wins in a court proceeding by the PHA against the Tenant. However, the Tenant may be obligated to pay such costs if the Tenant loses.

Legal aid comment asserts that the tenant should never be required to pay PHA attorney fees or court costs. Allowing the PHA to collect legal fees if the tenant loses deters the tenant from protecting tenant rights in State court. The assessment of cost of the tenant is more troublesome if the PHA excludes eviction from the PHA grievance process, so that the tenant can only contest eviction through the court.

PHA comment states that the tenant should pay legal fees when the tenant loses the court case. Tenant payment of legal fees and charges is a vital ingredient in the fiscal health of the PHA, and helps to promote tenant responsibility. Tenants get free help from legal aid, but the PHA is forced to retain counsel. Comment states that the tenant should be required to pay legal costs regardless of outcome, even if the tenant wins.

The rule retains the prohibition of lease provisions which obligate the tenant to pay legal costs even if the tenant wins in a court proceeding by the PHA against the tenant. Thus, for example, the PHA-drafted lease may not provide that the tenant must pay PHA legal costs of an eviction action if the State court finds that the PHA lacks grounds for eviction. The prohibition is consonant with similar prohibitions for other HUD rental subsidy programs.

The rule provides that the tenant may be obligated to pay legal costs if the tenant loses. The tenant should not be insulated from the obligation to pay legal costs if the tenant loses in the court proceeding. The allocation of legal costs should be determined by local law and practice. Payment by the losing party is not unreasonable, and compensates the PHA for the fiscal and administrative burden of conducting the litigation. The fact that the tenant may have to pay legal costs if the tenant loses discourages the tenant from pursuing an unsound or frivolous position. As suggested by PHA comment, the obligation to pay costs encourages tenant responsibility.

The rule does not prohibit imposition of legal costs to the tenant in the absence of litigation, or if litigation does not proceed to judgment, or the use of a lease provision which imposes such costs on the tenant.

PHA may be forced to take steps toward eviction (e.g., by serving a notice to quit) as a technique of inducing tenant compliance with the lease, so that the tenant will pay up the rent, or will stop unacceptable conduct. If the tenant complies, the eviction is not pursued. A PHA comment states that the PHA should be allowed to charge costs to tenant if the PHA stops the eviction action after the tenant pays the amount sued for. If the PHA can only charge costs to the tenant if the tenant loses, the PHA is forced to proceed to judgment, thus damaging the tenant's credit history. The tenant should be able to acknowledge error, remedy the problem, pay costs and avoid the judgement.

It is fair to make the tenant pay PHA legal costs which are incurred because of the tenant's non-compliance with the lease. Equally important, the existence of a penalty for delay (in the form of a requirement to pay the PHA legal costs) will tend to promote compliance with the lease. Conversely, the absence of a penalty tends to undermine the incentive for compliance with the lease. The rule leaves the door open to PHA use of lease clauses which require the tenant to pay PHA legal costs if a legal action does not proceed to judgment.

Comment states that if the tenant is required to pay legal fees if tenant loses, a losing PHA should also be required to pay legal fees. This suggestion is not adopted. The rule does not require payment of legal fees by either tenant or PHA. The rule also does not require that there be symmetry in the imposition of costs, such that the tenant is required to pay costs if costs are imposed on the PHA by State law or the lease, or that the PHA is required to pay costs if costs are imposed on the tenant.

5. Non-Payment

a. Remedy for Non-payment. A tenant may fail to pay rent or charges on time. The delinquency may be for the whole payment due, or only a portion of the payment. The delinquency may occur on an isolated occasion, or may be repeated month after month. There are two sanctions for non-payment. The PHA may evict the tenant, or the PHA may charge a late fee. Legal aid comment aims to restrict the right of the PHA to impose sanctions for tenant non-payment. Comment argues that HUD should narrow the authority of the PHA to terminate tenancy for non-payment of rent or charges, or to impose fees for late payment. PHA comment, on the other hand, welcomes provisions which strengthen the administrative authority of the PHA to devise and impose prompt and effective sanctions for non-payment.

The U.S. Housing Act of 1937 provides (section 6(c)(4)(B), 42 U.S.C. 1437(c)(4)(B)) that a PHA must comply with procedures and requirements prescribed by HUD to:

> assure that sound management practices will be followed in the operation of the [public housing] project, including requirements pertaining to * * * the establishment of satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of non-payment.

In this rule, the lease provisions are designed to provide a contractual basis for vigorous enforcement by the PHA of the tenant's responsibility to pay rent and charges under the lease. With respect to non-payment of rent, the lease provisions carry out the statutory directive to assure that PHAs establish satisfactory management procedures for the prompt payment of rents and processing of evictions (see House Committee Report 93–1114, pp. 23–25, June 17, 1974).

The expectation of the tenant that the PHA is ready and able to impose effective penalties for non-payment is the necessary underpinning to induce the tenant to pay on time. The lack of a penalty for late payment is likely to promote a pattern of rent delinquency. The Department has noted that:

> Although the payment of rent is difficult for a poor family, the requirement for payment of the statutory rent contribution could collapse unless enforced by the possibility of effective sanctions. (49 FR at 12218, March 29, 1984.)

Comment states that late payment should not be ground for eviction in assisted housing. Other comment states that chronic inexcusable late payment should be ground for eviction (but that the PHA should not be allowed to assess fees for non-payment).

A public housing tenant does not pay market rent, or an economic rent which covers the costs to provide the housing. The tenant is required to pay as rent a portion of income determined by statute (U.S. Housing Act of 1937, section 3(a), 42 U.S.C. 1437a(a)), and HUD regulation (24 CFR Part 913). The PHA must have the power to enforce the tenant's rent contribution, by assessment of fees for late payment, or by eviction of a tenant. Late payment of rent may have serious consequences for the PHA, including PHA costs to collect the delayed payment. The lack of an effective sanction for late payment will lead to habitual late payment by the tenants.

To enforce the tenant's duty to pay rent, the PHA must be able to terminate the tenancy for non-payment. The prospect of possible eviction is the most drastic and effective sanction for non-payment of rent or charges, and is the most powerful stimulus for the prompt payment of rent. The suggested distinction between non-payment and late payment is not a viable basis for distinguishing cases which should or should not be grounds for termination of tenancy. If a tenant may not be evicted for late payment, the tenant will wait to the last possible moment to pay the rent.

A tenant may be evicted for non-payment (including a single or repeated late payment) for any of the statutory grounds for termination of tenancy: for serious or repeated violation of the lease, or for other good cause. In the next section of this Preamble, we discuss when non-payment of rent or charges may be treated as a serious violation of the lease.

b. Non-payment as Serious Violation of Lease. Under section 6(l)(4) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(l)(4)), the PHA may terminate the tenancy for "serious or repeated violation" of the lease. The proposed rule would provide that "non-payment of rent or charges under the lease (including any portion of such amounts)" is a serious violation of the lease. Non-payment is therefore a ground for termination of tenancy, even if the violation is not repeated.

Legal aid comment states that non-payment of PHA charges should not be treated as a serious violation. Comment states that providing that any non-payment of any rent or any charge is a "serious" lease violation leaves too much room for PHA discretion. Comment objects to allowing the PHA to evict when only a portion of rent or charges is due, or only a small amount is due. PHA comment approves HUD's proposed treatment of termination of tenancy for non-payment. On reconsideration, HUD has decided to revise the provision that any non-payment of any amount of rent or PHA charges is a "serious" lease violation.

The concept of "serious" violation is significant because it determines whether a single lease violation is ground for termination of tenancy under the standard in the 1983 law. The PHA may terminate the tenancy either for "serious" violation or for "repeated" violation of the lease. Any pattern of repeated violation may be ground for termination of tenancy. A single violation is ground for termination only if the violation is "serious".

The PHA needs to determine whether a single non-payment of rent or charges is a serious lease violation, and hence ground for termination of tenancy. This determination may properly be based on an array of factors relating to impact of non-payment on PHA administration of the program. These factors may include the absolute amount of money due from the tenant, the portion of the amount due which is delinquent, PHA administrative and legal costs in collecting delinquent rent or charges, the effect of delinquency on PHA collections, how long the payment is overdue or other factors. In determining seriousness of violation in an individual case, the question is not primarily whether an isolated violation in the particular case will have a serious impact on the PHA program, but whether the type of violation involved would have a serious impact if broadly replicated in the PHA program.

The final rule provides (§ 966.21(b)(2)) that:

> The PHA may determine that non-payment of Tenant Rent or charges is a serious violation of the lease. In making this determination, the PHA may consider factors relating to impact of such non-payment on PHA administration of the program. These factors may include the amount owed, how much of the amount owed is overdue, costs of collection, effect of non-payment on collection of rents and charges, how long the payment is overdue, or other factors. The PHA may establish a policy for determining what type of non-payment will be treated as a serious violation of the lease.

The initial determination of the seriousness of different types of lease violation rests with the PHA. The PHA has a continuing responsibility for management of the local public housing program. The PHA is in the best position to know how non-payment will affect PHA collections, and the PHA's overall strategy for administration of the local program, and therefore whether the non-payment should be treated as a "serious" violation of the lease. The rule specifies that in making this determination the PHA may weigh a broad range of factors relating to management of the program. HUD expects that, in practice, most PHAs will develop a general pattern for handling non-payment cases, rather than handle the cases by an isolated examination of each individual instance of tenant non-payment.

The PHA may elect to adopt a formal policy for determining when non-payment (a single instance) is a serious violation, and thus grounds for termination of tenancy. The adoption of such a policy has several advantages. First, the process of adopting the policy is an occasion for systematic consideration of different types of non-payment, and the relation of non-payment to PHA management policy. Second, the adoption of a formal policy will tend to result in a more consistent treatment of non-payment cases, that is better related to overall PHA management policies.

The rule does not require that the PHA adopt a formal policy on when non-payment is a serious violation. The PHA may choose to determine if the violation is a serious lease violation on an informal or ad hoc basis.

The PHA may terminate tenancy if the tenant commits a "serious or repeated" lease violation by failing to pay rent or charges when due. However, even if there are grounds for termination, the PHA may decide that the tenant should not be evicted.

c. Excuse for Late Payment; Grace Period. Comment argues that non-payment should not be ground for termination of tenancy if the non-payment is excusable, or results from circumstances beyond control of the tenant. Comment states that inability to pay rent on time may result from late receipt of income, or from emergency or other special circumstances. Late payment should not be automatic grounds for eviction.

In public housing, the amount of rent is based on family income. Comment argues that rent should not be payable before the family has received the income on which the rent is based. The family may not receive income on the first of the month. Wages or welfare or other government benefits may be paid late. Wages or welfare payments may be paid twice monthly (rather than on the first of the month). Comment asserts that rent should not be due before some interval following actual receipt of income. Comment states that HUD should allow a "reasonable" time, should allow three days after actual late receipt of regularly scheduled income, or should set a minimum Federal grace period.

Public housing rent is calculated on an estimate of anticipated income over the period to the next scheduled reexamination, and is based on the income information provided by the family. The rent determination essentially "averages out" family income over the reexamination period. Actual income in any particular month may be more or less than the average monthly income over the year, because of changes in family income or because of variations in the time at which the income is received. The rent due to the PHA at the beginning of each month is not based on the income actually received by the family during the month immediately preceding the rental payment, but on the average monthly income for the period covered by the reexamination. Under this system, it is the responsibility of the tenant to put aside enough money to cover the statutory rental payment when the payment is due. This type of system permits practical administration of the statutory requirements for determination or rent based on family income.

Family income may be comprised of income from various sources, received at varying intervals, at varying points of the month and with varying regularity. The time when income is actually received is affected by a host of particular circumstances. Comment indicates that rent due each month should be based on amounts actually received during the preceding month, or should be payable piecemeal over the course of the month, as the family receives the segments of family income on which the rent is based (such as a biweekly payment of welfare benefits).

HUD believes that a system based on these principles would not be workable. Currently, a PHA is required to determine tenant rent "at least annually", as required by statute. Under the proposed change, the PHA would have to separately determine rent payable for each individual month, or even at particular points during the month. Moreover, the determination of how much is due would depend on facts concerning when the income was received during the month. The PHA would be forced to use new procedures for monthly determination of the monthly rent, and to give opportunity for the tenant to show excuses for nonpayment. Verification of tenant excuses would be burdensome or impossible.

Institution of the proposed changes would vastly increase difficulties of the PHA in projecting and planning for tenant rental income. Receipts would be subject to erratic variations depending on actual or alleged delays in payment.

Comment states that the rule should protect a tenant who cannot pay the rent due to loss of income, or who needs funds to cover a financial emergency, such as desertion by the family breadwinner, delay or wrongful termination of governmental benefits, death in the family, loss of employment. These cases may be divided into two categories: (1) Cases in which the tenant loses some income source originally included in the estimate of family income used to compute the rent, e.g., when a family member loses a job, or (2) cases in which the family needs to use family income for some urgent purpose, e.g., emergency medical expenses.

If there is a decrease in anticipated family income, the tenant may ask for an interim examination. Section 960.209(b) provides that if there is a change in income between regular reexaminations the PHA must "make any adjustments determined to be appropriate" (see discussion at section III.G.2.b of this Preamble).

The need to use rent money for some other urgent and meritorious purpose cannot be accepted as an excuse for non-payment of rent. In the nature of the public housing program, the duty to pay rent is always imposed on a family of slender financial resources. Almost always, the family has many pressing financial needs. The statutory rent formula represents a Congressional determination that all families in public housing must pay a rental contribution based on the amount of family income. There is no statutory exception for a family which alleges a compelling need to use the rental monies for some other purpose, however worthy.

Beyond the fiscal benefits, universal enforcement of rent payment against all assisted families is an element in the education of the families in the personal and financial discipline needed to escape from poverty. Public housing families must learn to plan and save for the monthly rent payment, and so must bear the consequences if they do not. In addition, tough and universal enforcement of the rent requirement is more likely to breed respect and care for the housing.

Comment states that the grace period for payment of rent under the Federal rule should never be less than allowed under State law. Comment notes that protections beyond the Federal rule may be allowed to a tenant under State law, such as the right, in a particular State, to redeem the tenancy by payment of back rent.

Nothing in this rule is intended to override State law protections for a tenant who is delinquent in the payment of rent, or to cut short any grace period which may be required under the State law. The Federal statute and this rule establish minimum procedural and substantive protections for a public housing tenant. These Federal protections may be supplemented by additional protections which are required by State law, and which do not contravene any element of the Federal Scheme.

d. Fees for Late Payment. (1) Authority to Levy Fee for Late Payment. The rule (§ 966.10(e)(2)) permits a PHA to assess the tenant reasonable fees because of late payment of rents or charges to the PHA.

Comment states that penalties for late payment should not be allowed, or should not be allowed for late payment of charges other than rent. Comment states that because public housing tenants are indigent, late charges increase the likelihood that a tenant in arrears will not be able to catch up. Instead of inducing prompt payment, late fees make catching up virtually impossible.

Other comment strongly urges retention of late payment penalties. The imposition of penalties for late payment is a tool to assure timely payment by the tenant. Failure to charge penalties for late payment will result in high delinquency, high turnover and unnecessary use of manpower to collect back rent. The lack of late charges will result in more evictions.

The imposition of late fees is a legitimate way of getting families to put rent or charges on time. The use of late fees for this purpose helps enforce the statutory requirement for PHAs to establish satisfactory procedures "designed to assure the prompt payment and collection of rents" (U.S. Housing Act of 1937, section 6(c)(4)(B), 42 U.S.C. 1437d(c)(4)(B)). By charging fees for late payment of rent or other charges, the PHA may be able to avoid the need for a more drastic sanction against a non-paying tenant—by evicting the family from the unit. The PHA should be able to utilize lesser remedies, to minimize the need for recourse to more severe actions against the tenants.

Comment states that the PHA should not be allowed to levy late fees for non-payment of charges other than rent, such as charges for maintenance or for excess consumption of utilities. The late fee is an unreasonable punishment for a tenant who owes a small amount for charges, or who contests the validity of the charge. If tenant is contesting the charge, non-payment may create a potential liability equal to the contested charge. Comment alleges that a charge for late payment discourages the tenant from contesting the charge.

The final rule allows the PHA to assess late charges for non-payment of rent or other charges. The reasons for permitting the PHA to levy late fees apply equally to late payment of PHA charges as to late payment of monthly rent. The PHA must have a sanction, short of eviction, that gives the tenant an incentive to pay up charges owed to the PHA.

HUD does not agree that the assessment of a late charge is likely to discourage the tenant from contesting PHA charges, either through the PHA grievance process or as a defense in an eviction action brought by the PHA. The tenant can both pay and contest the charge. Alternatively, if the tenant does not pay the charge, the possible imposition of a late fee on top of the original charge may fortify the tenant's incentive to contest the charge. Payment of a charge other than rent, including a late charge (for non-payment of rent or other charges) is not a prerequisite for use of the PHA grievance procedure to contest assessment of the charge.

Comment states that if a tenant contests the claim of non-payment, the PHA should not be allowed to impose charges for non-payment until the tenant is adjudged responsible. This recommendation is not adopted. When the tenant does not pay the rent on time, the PHA suffers administrative and fiscal damage from the time of non-payment, not merely from the time when the tenant is adjudged responsible for non-payment.

(2) Amount of Fee for Late Payment. Comment states that the PHA should only be allowed to impose "reasonable" late fees, or proposes various limits on the amount of such fees. Comment acknowledges that the PHA must charge reasonable late fees as an incentive for prompt payment. However, a requirement that fees must be "reasonable" does not give sufficient guidance. Under this broad standard, PHAs will abuse the authority to determine the amount of the late

payment fee. PHAs will impose late fees which are unreasonable. A more explicit rule would promote more reasonable and predictable action by the PHA.

Comment states that a late fee for non-payment of charges other than rent should bear a relationship to the amount of the charge, should be capped at a percentage of the amount due, or should not be higher than the amount of the charge. Other comment states that late charges should be based on reasonable compensation for delay, but should not be a "penalty". Comment states that the late charge should not exceed the legal rate of interest.

The proposed rule would permit a lease provision which allows the PHA to assess "reasonable penalties" for late payment of rent or charges. The final rule provides that the lease may require the tenant to pay "reasonable fees" for late payment of rent or charges determined by the PHA § 966.10(e)(2)). The term "fees", rather than "penalties", is used as a more neutral description of charges imposed on a tenant who delays payment of rent or charges. The fees may or may not be intended as a "penalty". The standard controlling the amount of late payment fees is separately and sufficiently expressed by requiring that fees must be "reasonable".

The reasonableness standard is flexible, and allows the PHA to consider any appropriate factors in setting the amount of fees for late payment of rent or charges. For example, the amount of late charges could be designed to meet PHA administrative costs as a result of late payment, or to provide an incentive for prompt payment. The amount of the fee could reflect the amount and period of delinquency by a tenant. The amount of the fees could also reflect PHA experience with particular tenants. The PHA may elect to charge higher fees for a tenant who is habitually delinquent, than for an initial delinquency. The PHA's determination may take into account the motivations or circumstances of a particular tenant, such as the degree of hardship to the family. A system for determination of late fees may be based on a formal and detailed articulation of rules. Alternatively, a system may allow considerable room for case-by-case judgment by PHA management, based on knowledge of the family and of the PHA's management imperatives.

In all cases, the late fees must be "reasonable". HUD finds no reason or advantage for attempting to limit late fees by a more explicit Federal standard. It would be difficult to devise a more elaborate and explicit standard which captures the full range of appropriate considerations summarized in the concise and flexible requirement that late fees must be reasonable.

HUD also finds no reason for stating any more explicit standard governing the relationship between the amount of rent or charge owed by the tenant, and the amount of late fee for non-payment of the amount owed. The reasonableness standard affords a reasonable restriction on the imposition of fees which are disproportionate to the amount of the original rent or charge. Moreover, there may be good reasons for establishing a late fee not directly based on the amount of the original charge. First, the PHA's administrative costs to collect delinquencies may not bear a direct or close relation to the amount of the original charges. Administrative costs to pursue particular delinquencies may exceed the amounts the PHA is trying to collect. Second, fees may be designed to support integrity of the PHA collection system—by imposing additional fees on a tenant who pays late. In this connection, the relevant question in determining the amount of the fee is not, or need not be, how much is owned, but how much late fee will be adequate stimulus for prompt payment.

e. Non-payment of Utility Bill. Sometimes utilities are paid by the PHA and included in rent ("PHA-furnished utilities"). Sometimes utilities are paid by the tenant, and are not included in the rent ("Tenant-purchased utilities") (see generally, § 966.10(d)). If utilities are to be paid by the tenant, a utility allowance is deducted from the tenant's rent to the PHA, so that the tenant will have enough money to pay for utilities. In the final rule, the discussion of utilities is revised by adding a new provision (§ 966.10(d)(4)(ii)) concerning a shut-off of tenant-purchased utilities:

> "If there are Tenant-purchased utilities, and the utility supplier shuts off utilities because of Tenant's failure to pay the utility bill, occurrence of the shut-off shall be considered a serious violation of the lease by the Tenant."

A utility shut off may damage the structure, and may result in deterioration of living conditions in the project, for other families as well as the family which fails to pay the utility bill. It is the tenant's responsibility to pay the bill.

H. Information and Certification

1. Duty to Supply

The tenant is required to supply any information which HUD or the PHA determine to be necessary. This includes information needed to determine tenant rent. The rule provides (§ 966.10(h)(1)(iv)) that the tenant must:

> Supply any certification, release, information or documentation which the PHA or HUD determines to be necessary, including submissions required by the PHA for an annual reexamination or interim reexamination of Family income and composition in accordance with HUD requirements * * *

In the final rule, the statement of a tenant's duty is amplified by providing (§ 966.10(h)(3)(ii)) that the lease must include a tenant certification that:

> All information or documentation submitted by the Tenant and other members of the Household to the PHA in connection with any Federal housing assistance program (before and during the lease term) are true and complete to the best of the Tenant's knowledge and belief.

This tenant certification in the lease covers both a submission of information by the tenant before execution of the lease (such as information submitted to support tenant's application for admission to public housing), and a submission during the term of the lease (such as information submitted at annual recertification during the term of the lease).

PHA comment agrees that the lease should obligate the tenant to supply information or certification demanded by the PHA. However, legal aid comment asserts that a requirement for submission of any PHA-required documentation is overbroad. Tenant privacy should be protected. Comment states that a PHA may demand open-ended releases, which would enable the PHA to obtain information which is not relevant. The PHA should only be allowed to require submission of "relevant" or "necessary" documentation. The rule should specify that the PHA may only require the tenant to furnish information or releases in connection with family income or family composition.

All public housing tenants must supply information on family income and composition. The information is needed to determine the rent in accordance with Federal requirements. A PHA may, however, legitimately determine that there is need for other information, for example information bearing on the possibility of violent or illegal activity by family members. HUD will not limit the PHA to requiring tenants to furnish information on family income or composition.

The rule provides that the tenant must supply any information "which the PHA or HUD *determines to be necessary*"

(§ 966.10(h)(1)(iv)). Thus the tenant's duty to furnish information to the PHA depends on the PHA's determination that the information is "necessary". HUD finds no need to change this regulatory language. The PHA must be left the discretion to decide what type of information is necessary, over and above the minimum required by HUD. As in most aspects of day-to-day management of public housing, the PHA should have the flexibility to decide what is needed in the local public housing program. HUD has no information or reason to believe that the PHA discretion to decide what information is necessary has been, or will be, widely abused.

2. Failure To Supply—Termination of Tenancy

The PHA may determine that the tenant's failure to supply PHA-required information "timely" is a serious lease violation (§ 966.21(b)(1)). Comment states that the tenant may not know what "timely" means, and that the term can be abused by the PHA.

To submit information "timely", the tenant must be told what must be submitted and when. To clarify this point, the final rule adds a new provision (§ 966.10(f)(4)) that:

> The PHA shall give the Tenant reasonable notice of what certification, release, information or documentation must be supplied to the PHA, and of the time by which any such item must be supplied * * *

The PHA may terminate tenancy for "serious or repeated" violation of the lease (§ 966.21(a)). The proposed rule states that a tenant's failure to timely supply to the PHA any certification, release, information or documentation on family income or composition is a serious violation of the lease.

PHA comment welcomes the clarification that the tenant's failure to supply required information is a "serious" violation, and is grounds for termination of tenancy. The lease should provide that the tenant's refusal to complete reexamination, provide required verification or sign a required release is grounds for eviction. Tenants often fail to respond to the PHA's request for recertification or other information. Tenant delay often holds up timely completion of reexamination, and causes a great administrative burden for the PHA. The old rule does not plainly establish that failure to provide required information is a serious violation of the lease. The new provision helps a PHA secure the cooperation of the tenant, and will support the PHA in court if the PHA is forced to terminate the tenancy.

Legal aid comment states that a delay in furnishing required information should not be grounds for termination of tenancy if the tenant delay is excusable. The rule should not characterize all tenant failure to provide information as a serious lease violation or other good cause. Instead, the rule should provide that a failure to submit the information "may" constitute a substantial violation or other good cause for termination. The rule should recognize PHA discretion to determine whether a failure to provide information to the PHA is ground for termination of tenancy. PHAs should be encouraged to take difficulties in providing the information into account.

It is reasonable to assume that the compliance rate will rise if the sanction for failure to timely deliver required income or other documentation to the PHA is sure and quick eviction of the family, and if this message is effectively communicated to the tenant. Confronted with a tough enforcement policy, the tenant will make the extra effort to produce the documents on time. Confronted with a soft enforcement policy, the tenant will find excuses for failing to produce the documents on time.

In response to comment, the rule is amended to explicitly recognize PHA discretion to determine whether a failure to provide information to the PHA is ground for termination of tenancy. The rule is revised to provide that "the PHA may determine" that the tenant's failure to timely supply required information or documentation is a serious violation of the lease (§ 966.21(b)(1)). The determination whether a failure to provide information should be grounds for termination of tenancy is made by the PHA.

The rule gives the PHA an unambiguous legal right to terminate the tenancy if a tenant does not supply a required document on time. This does not mean that a PHA will automatically evict any tenant who submits a document late or incomplete. Even if the PHA has good cause grounds for termination of tenancy, the PHA has management discretion to decide whether to proceed with termination and eviction. In making this decision, the PHA may consider any relevant factors concerning the program or the family, including whether the tenant is making a good faith effort to produce the documents, or is hindered by external factors beyond the control of the family.

In sum, the PHA has discretion to determine whether the failure to provide required information is a serious lease violation, and also has discretion whether to evict the family because of the violation.

I. Transfer From Unit

1. Regulation

The final rule provides (§ 966.10(h)(1)(v)(A)) that the tenant must move from a public housing unit if:

> (1) The PHA determines the Household is residing in a unit which is larger or smaller than appropriate for the Household size and composition under the PHA unit size standards, or determines that the character of the unit is otherwise inappropriate for the Household size and composition (such as a unit modified for use or accessibility by handicapped, which is currently occupied by a Household whose members are not handicapped), or determines that the unit requires substantial repairs, is scheduled for modernization, or is not in decent safe and sanitary condition, and
>
> (2) The PHA offers the Tenant another Public Housing dwelling unit. The Public Housing dwelling unit shall be decent, safe and sanitary and of appropriate size under the PHA unit size standards.

The final rule also provides (§ 966.10(h)(1)(v)(B)) that the tenant must move from a dwelling unit if:

> The dwelling unit is hazardous to the health or safety of the occupants.
>
> The rule states (§ 966.10(f)(3)) that if a hazardous condition is not corrected in a "reasonable time":
>
> * * * the PHA shall offer the Tenant the opportunity to move to a replacement dwelling unit if available. The PHA is not required to offer the Tenant a replacement unit if the hazardous condition was caused by fault or negligence of household members, or of guests, visitors, or other persons under control of household members.

The bulk of public comments concern (1) clarity and breadth of the grounds for transfer, (2) proposals to restrict grounds for transfer, (3) proposals to add restrictions on acceptability of substitute housing.

2. Grounds for Transfer

a. General. The PHA may require the tenant to transfer to a replacement unit if the PHA determines:

- —The family is living in a unit that is larger or smaller than appropriate for the family size and composition under the PHA unit size standards, or
- —The character of the unit is otherwise inappropriate for the family size and composition, or
- —The unit requires substantial repairs, is scheduled for modernization, or is not in decent, safe and sanitary condition (including a unit which is hazardous to health or safety of occupants).

For convenience in this discussion, we refer to the cases when a tenant must move from the public housing unit, to a replacement unit offered by the PHA, as "grounds for transfer".

The new rule gives the PHA more control over use of public housing stock, by broadening the grounds for transfer which were allowed under the old rule. Comment claims that the authorized grounds for transfer under the proposed rule are too broad, and that the PHA is given too much authority to relocate public housing tenants. Comment states that the proposed grounds for transfer are a PHA rule of convenience, but do not show a proper regard for the traumatic or disruptive effects of family relocation. The PHA should only relocate the tenant in extreme circumstances. The rule should incorporate procedural safeguards to insure that a PHA determination to move the family is reasonable and necessary.

The grounds for transfer stated in this rule are all reasonable bases for requiring the family to move from the unit, and the tenant must be offered a suitable replacement unit, as discussed in section III.I.4 of this Preamble. The grounds reflect the special character of public housing as distinct from private unassisted housing, and the special needs of the PHA in managing the housing.

b. Unit Too Large or Too Small for Family. The first ground for transfer of the tenant to a new unit is a PHA determination that there is a mismatch between the unit presently occupied by the family, and the present size or composition of the family. The PHA determination must be based on the PHA's general policy ("unit size standards") governing the size of dwelling units for public housing families, rather than an ad hoc judgment of the PHA for the individual family required to move. The rule provides that the PHA may require the tenant to move if "the Household is residing in a unit which is larger or smaller than appropriate for the Household size and composition under the PHA unit size standards" (§ 966.10(h)(1)(v)(A)(1)).

In general, such discrepancies most often arise because there is a change in the size or composition of the family since initial occupancy of the unit by the family. A unit may be too large for the family because family members moved out since initial occupancy. A unit may be too small for the family if family size has grown since initial occupancy (for example, by birth of additional children), and the unit is now overcrowded.

The PHA must have the legal right to require the tenant to move from the unit if the family is not the right size for the unit occupied. This authority allows the PHA to make better use of the PHA housing stock, for the overall benefit of eligible families. For example, there may be a severe shortage of large units in the PHA projects and in the local housing market. Assume that a family consisting of a couple with four children was originally allocated a three bedroom unit under the PHA occupancy policy. The children grew up and moved out, and only the parents now remain in the unit. Continued occupancy of the three bedroom unit by the two empty-nesters means that the unit is denied to a large family in urgent need of the unit.

c. Unit Inappropriate for Family. The second ground for transfer of the family is a PHA determination that the "character of the unit" is "otherwise inappropriate" for the household size and composition (§ 966.10(h)(1)(v)(A)(1)). Comment asks for an example of what type of occupancy is "otherwise inappropriate". The final rule adds the following example of a case where the character of the unit may be inappropriate for the household:

> a unit modified for use or accessibility by handicapped, which is currently occupied by a Household whose members are not handicapped.

The PHA may need to move the original family out, so that a handicapped person who needs the special handicapped features can live in the unit. The PHA should have ample authority to assure that a particular unit is occupied by the type of family which may best benefit from special characteristics of the unit.

d. Condition of Unit. The third ground for transfer of the family is a PHA determination that the unit "requires substantial repairs, is scheduled for modernization, or is not in decent, safe and sanitary condition" (§ 966.10(h)(l)(v)(A)(1)). This provision is intended to give the PHA necessary flexibility to accomplish needed work on public housing units. The work may be rendered difficult, expensive or impossible if families in occupancy cannot be moved to other housing.

In addition, the rule provides separate treatment for the special and urgent case where condition of the dwelling unit is hazardous to occupants. In general (as discussed in section III.I.4 of the Preamble), the tenant is only required to move if the PHA offers the tenant occupancy of another *public housing* unit. However, if the unit is hazardous for the occupants (and the condition is not corrected in a reasonable time), the PHA must offer the opportunity to move to a "replacement dwelling unit if available", which may or may not be a public housing unit (§ 966.10(h)(l)(v)(B) and § 966.10(f)(3)). Thus the rule plainly states the correlative obligations of the PHA and the tenant when the unit endangers safety of the occupants. The PHA is required to offer an available replacement unit, and the tenant must move from the original hazardous unit.

The PHA is not required to offer a replacement unit if the dangerous condition was caused by "fault or negligence" of household members or of "guests, visitors, or other persons under control of Household members" (§ 966.10(f)(3)). The PHA should not, and does not, have to offer a new unit if the family created dangerous conditions in the original unit. A family with this history may do the same in a new unit—and, by doing so, cause injury to family members and others, as well as expense and administrative burden for the PHA. If the PHA does not offer a new unit, the family should not continue to live in a unit which endangers health and safety of the occupants. If dangerous conditions are not fixed, the family should be required to move from the unit. Damage or destruction of the unit by fault or negligence of the household is a serious violation of the lease (see § 966.10(h)(2)(ii)), and is ground for termination of tenancy and eviction of the unit occupants.

3. Proposed Restrictions on Transfer

Public comment proposes a number of additional substantive or procedural requirements for transfer of a public housing tenant.

Comment recommends that the PHA should only be allowed to transfer the tenant at lease expiration, or that the PHA should not be allowed to transfer the tenant for at least one year after death of a family member, or should not be allowed to transfer the tenant if a transfer would work an undue hardship on the family. These suggestions are not adopted. The proposed restrictions artificially constrict the ability of the PHA to realize the purposes of the respective grounds for transfer. For example, a delay in transfer of the family may delay modernization of the unit, or may perpetuate underuse of an oversize unit.

The requirement for a tenant to move from the unit is a contractual condition of the assisted tenancy, not a condition which may only be exercised at the end of the lease term. In practice, most PHAs probably use leases which continue month-to-month until terminated for cause. In such cases, a provision that the tenant may only be moved at lease termination would have little practical effect—at any given time the PHA is no more than a month away from lease expiration.

The death of a family member, or other particular family circumstances, may call for understanding and flexibility by the PHA. These varying circumstances are, however, most properly addressed to the judgment and good sense of local PHA management, and are not to be handled by the imposition of a rigid, Federally imposed rule that cannot possibly reflect the infinite variety of personal and local circumstances.

Comment suggests that the family should have at least 30 days, or at least 120 days, to move from the unit. HUD finds no need to set a uniform Federal notice period, and has no basis for establishing any particular notice period. PHAs can set reasonable notice periods, and do not need Federal guidance. Both consideration for tenants, and the needs of orderly project administration will tend to induce the PHA to give reasonable notice to tenants.

4. Substitute Housing

a. Offer of substitute housing. The existence of grounds for transfer is a necessary, but not a sufficient condition for requiring the tenant to move. The PHA must also offer the tenant replacement housing (§ 966.10(h)(l)(v)(A)).

The proposed rule would have allowed the PHA the option of offering the family either another public housing unit, or the opportunity to rent a private unit with subsidy under the section 8 certificate or voucher programs. Public comment asserts that these alternatives, as framed in the proposed rule, do not afford adequate protection for the interests of the family.

b. Offer of Section 8 Certificate or Voucher. Comment states that the tenant should not be forced to take a section 8 certificate or voucher in place of a public housing unit. Comment claims that the certificate and voucher programs give less protection to the tenant, and are not the equivalent of public housing.

In the certificate and voucher programs, a family must find a unit on the private rental market. Comment notes that a family may not be able to find a unit. Large families, families with single parents, welfare families and minority families have greater difficulty in finding landlords willing to rent. Comment remarks that it will be hard for a PHA to show that a private unit is available for occupancy under the certificate or voucher program. Comment asks if a handicapped tenant should be forced to move out of an accessible public housing unit to an inaccessible unit rented on the local housing market. In the voucher program, the family may be forced to spend more than 30 per cent of income for housing (since there is no statutory limit on the amount of rent paid by an assisted family in that program).

Comment also points out that in the section 8 certificate and voucher programs the family does not have security of tenure which is equivalent to public housing. After one year, the section 8 tenancy can be terminated (for other good cause, such as a business or economic reason for termination of tenancy). A private landlord may decide to remove the unit from the section 8 program. If the section 8 tenancy is terminated, the family may be left high and dry, unable to find another unit.

Comment states that the family should have a right to remain in public housing, or a right to certificate or voucher assistance, or that the PHA should give the family a choice between public housing or assistance under the certificate or voucher programs. The certificate and voucher programs are generally more attractive than public housing. Thus there is usually a good reason if the tenant elects to remain in public housing, instead of choosing voucher or certificate assistance.

After reconsideration, HUD has removed the proposed provision which would require the tenant to move if the PHA issues a section 8 certificate or voucher, and an acceptable unit is available for section 8 assisted occupancy by the family. The final rule provides that the PHA must offer the tenant another public housing unit. As suggested by public comments, there are important differences between public housing and tenant-based housing assistance under section 8. It may also be difficult to determine if a private market unit is in fact available for occupancy by the family with assistance under the certificate or voucher programs, and thus to determine whether the PHA has satisfied the obligation to offer the tenant replacement housing actually available for occupancy by the family.

HUD does not adopt the suggestion that the public housing family should be given a right to issuance of a voucher or certificate.

The final rule does not contain a provision governing the offer of continued assistance under the certificate or voucher programs. The PHA may offer a certificate or voucher in accordance with the regular requirements of these programs, and the tenant may elect to accept such assistance instead of remaining in public housing. However, since the transfer from public housing to section 8 results from the free choice of the PHA and family, and is subject to the ordinary rules governing admission to the section 8 programs, there is no need for a regulation provision on this subject.

c. Offer of Another Public Housing Unit. The tenant must move if the PHA offers the tenant another public housing unit (§ 966.10(h)(1)(v)(A)(2)). The replacement unit must be decent, safe and sanitary, and must be of appropriate size under the PHA occupancy standards. The tenant is not required to move to a public housing unit which is substandard or too small for the family.

Comment advocates establishing further restrictions on the character and location of the public housing unit which must be offered to the tenant. Comment states that the PHA should have to offer the tenant a unit in the same project or neighborhood, or in a comparable neighborhood, or that the PHA should have to allow the tenant a choice of alternative sites. Comment also states that the PHA should be prohibited from offering the tenant a worse unit, and that the unit offered should be of a comparable housing type.

HUD believes the proposed restrictions would be too hard to apply, and would unduly constrict flexibility of the PHA in management of its housing inventory. The interests of the family are adequately protected by requiring that the replacement unit is decent, safe and sanitary, and of appropriate size.

In one circumstance, the tenant may be required to move from a public housing unit even though the PHA has not offered a public housing unit as replacement. If the tenant's public housing unit is hazardous, the PHA must offer a replacement unit if available (§ 966.10(f)(3)), and the tenant must move from the original hazardous unit (§ 966.10(h)(1)(v)(B)). In this circumstance, the PHA is not required to offer a public housing unit as the replacement.

5. Other Comments on Transfer Policy

This section responds to several remaining comments on transfer of public housing tenants.

Comment states that the PHA should be required to reimburse the tenant for out-of-pocket expenses in moving to a new unit. HUD has not adopted this recommendation. The PHA has limited funds to run the public housing program. Like most aspect of day-to-day management, the decision on whether to reimburse the tenant, from the limited resources available to the PHA, is best left to the PHA.

Comment states that where a family is moved out of a public housing unit to give the PHA access for repairs, the family should have the right to move back into the same unit after repairs are made. HUD has not adopted this recommendation. The most urgent interest of the family is for shelter in a standard unit, not for occupancy of the particular public housing unit previously occupied by the family. The proposed change could considerably complicate the PHA task of coordinating work on public housing units with occupancy of the units. The comment, if adopted, could reduce the number of project units available for occupancy by lower income families.

Comment states that a PHA determination which requires the tenant to move to another public housing unit should be covered by the grievance process. HUD agrees. Under the grievance procedures in this rule, a proposed PHA decision to require the tenant to move to another public housing unit is a grievable subject ("proposed adverse action") (§ 966.31(a)(2)(ii)) (see discussion in section V.B.2.f of this Preamble). The purpose of the grievance hearing is to determine whether the proposed PHA decision requiring the tenant to move violates the lease, or violates other laws or rules. The hearing officer does not have authority to overturn a management decision by the PHA which requires the tenant to move in accordance with the lease.

Comment states that the lease should incorporate standards and procedures regarding a transfer requested by the family. The PHA should grant all transfer requests which are based on health, proximity to work or schools, and other such reasons. Comment states that the PHA should be required to establish written transfer policies.

In this rulemaking, HUD did not propose any new regulation concerning policy on tenant-requested transfers. No public comment was requested on proposals in this area. HUD does not have any regulatory requirements on this subject, and does not know of any compelling need or general demand for regulation on this subject. The chief thrust of this rulemaking is deregulation, and the devolution of additional management flexibility to public housing PHAs. A PHA can establish tenant transfer policies without new HUD guidance or compulsion.

A requirement to grant all tenant transfer requests could be enormously burdensome and expensive for the PHA. Such a requirement could hinder a PHA in the efficient and equitable allocation and use of public housing units. The PHA could incur significant additional expense, such as the expense of fixing up the unit vacated by a tenant who moves to a new unit. Even if a tenant has a substantial reason for wanting a transfer to another public housing unit, the PHA may determine that other applicants or tenants have a more urgent need for available units. HUD has not adopted the recommendation to adopt new requirements on tenant-requested transfers.

J. Obligation To Allow Inspection of Unit

The final rule simplifies old rule provisions concerning entry and inspection of the unit by the PHA. The old rule provides that the PHA may enter the unit during reasonable hours, after reasonable advance notice to the tenant, and specifies that two days notice is reasonable. Under the old rule, the PHA may enter without advance notice if the PHA has reasonable cause to believe that an emergency exists.

In this rulemaking, HUD first proposed to eliminate HUD restrictions on PHA entry of a tenant's unit (proposed rule of December 1982). In response to public comment on this proposal, HUD proposed provisions which would allow the PHA to inspect the dwelling unit at reasonable times and after reasonable notice (proposed rule of July 1986). The proposed provisions are revised in this final rule.

The final rule provides (§ 966.10(k)):

> (1) The lease shall state the purposes for which the PHA may enter the dwelling unit. The purposes may include entry to inspect the unit, to make repairs or improvements, or provide other services, to show the unit, or for other purposes stated in the lease.
>
> (2) The PHA shall give the Tenant at least 24 hours written notice that the PHA intends to enter the unit. The PHA may enter only at reasonable times.
>
> (3) The Tenant shall allow the PHA to enter the unit in accordance with the lease.
>
> (4) If the PHA has reasonable cause to believe that there is an emergency, the PHA may enter the unit at any time without advance notice to the Tenant, and may enter without consent of the Tenant. After such entry, the PHA shall give the Tenant a written notice of when the PHA entered the unit, and the reason for such entry.

Legal aid comment states that the proposal for a lease provision which allows PHA to inspect the unit at reasonable times and after reasonable notice would not adequately protect the tenant's privacy and right of possession. Comment states that the proposed requirement for "reasonable" notice is standardless or subjective. The determination on how much notice is reasonable should not be left to the discretion of the PHA. The proposed change invites litigation over invasion of the tenant's right to privacy, and will lead to uncertainty and conflict. The old rule is clear, simple, and avoids unnecessary disputes.

Comment states that unless a minimum notice period is fixed in the HUD rule, a PHA may set inadequate notice periods. The PHA may allow staff to enter a tenant's apartment while the tenant is away. The proposed change will allow PHA employees to discriminate among tenants. The rule change encourages excess involvement by the PHA in the day-to-day lives of the tenants, and PHA spot-checking that violates the tenant's right to privacy.

PHA comment generally supports rule changes to facilitate PHA inspection of the unit. The PHA is responsible for maintaining the unit in decent, safe and sanitary condition. To perform this function, the PHA must make frequent inspections of the unit. The PHA should be allowed to define reasonable notice. The old rule is a hardship for the PHA. However, some PHA comment indicates that the old rule does not present major problems.

Comment states that except for emergencies, a PHA should be required to give at least two days notice of intention to enter the unit. Other comment recommends that the notice period should be shortened to 24 hours. Comment notes that a 24 hour notice period is specific, but not so onerous as to hamstring the PHA.

Language of the July 1986 proposed rule did not explicitly state that the PHA has a right to enter the unit without notice or tenant permission in case of emergency. PHA comment recommends that the PHA be allowed to enter the unit without notice if the PHA has reasonable cause to believe that there is an emergency. A provision to this effect was contained in the old rule. Comment suggests that the PHA should be allowed to enter the unit on 24 hours' notice in emergency cases.

The final rule provides that in non-emergency cases, the PHA must give the tenant at least 24 hours' written notice of intention to enter the unit (§ 966.10(k)(2)). However, if the PHA has reasonable cause to believe there is an emergency, the PHA may enter at any time without advance notice to the tenant, and may enter without consent of the tenant (§ 966.10(k)(4)). However, in this case, the PHA must leave the tenant a written notice of when and why the PHA entered the unit.

The inspection requirements in the final rule will permit the PHA to enter the unit for purposes stated in the lease—for example, to inspect the unit for tenant-caused damage. At the same time, the 24-hour notice rule for non-emergency cases sets a definite minimum notice period. The revision therefore answers the concern that the lack of a specific minimum notice standard will lead to disputes, and that PHAs will be prone to give inadequate notice to tenants.

The 24-hour notice period in the final rule is more precise than the notice provisions in the old rule. The old rule provided that the PHA must give "reasonable" notice, and that two days notice is considered reasonable notice. The language of the old rule implies that the PHA may give less than two days' notice if the period is reasonable under the circumstances. Implementation of the old rule therefore requires a judgment of what notice of less than two days is "reasonable" as applied to a particular set of facts.

Although the minimum notice period required by this rule is the same for all PHAs, it does not follow that the HUD notice requirements affect all PHAs in the same way. The notice period will have different practical consequences for different PHAs and for different circumstances. Some PHAs may choose to allow a longer notice period, as a matter of management judgment or preference. In many cases, State law may require a longer notice period. For example, the Uniform Residential Landlord and Tenant Act (§ 3.103) provides that "except in cases of emergency or unless it is impracticable to do so" a landlord must give a tenant at least two days' notice of intent to enter.

Public comment in this rulemaking observe that public housing tenants have an equal right and need for privacy as other apartment dwellers. HUD notes that the HUD regulation establishes minimum Federal requirements for notice to a tenant, but does not preempt State laws which require longer notice to the tenant. Since the HUD regulation does not override tenant rights under local law that do not contradict specific provisions of the Federal rule, public housing tenants enjoy tenant rights vouchsafed by State law, as well as Federal protections under the HUD regulations.

The provisions allowing immediate entry to the unit in an emergency afford the PHA flexibility to respond to the most urgent cases, where the PHA should not have to wait for expiration of a set uniform notice period. For example, if there is a flood in the tenant's apartment, the PHA may need quick access to the unit to minimize water damage to the apartment and to other apartments. In the nature of emergency situations, the PHA must have the management discretion to decide when the normal one-day waiting period is not appropriate. HUD does not believe that operation of the emergency provision will commonly be the subject of major dispute. First, the decision that there is ground to enter the unit without advance notice depends on the PHA's own determination that there is "reasonable cause to believe" that there is an emergency. The spot decision by the PHA is not subject to challenge if PHA officials believe there is an emergency, and if there is "reasonable cause" for such belief (whether or not it turns out, in retrospect, that the emergency actually existed). Second, in most cases emergency situations will be clear and unambiguous, such as a fire in the apartment.

Some PHAs state that the PHA should not be required to give advance notice of entry for certain routine PHA functions such as pest control or unit repair. The PHA needs to enter the unit on a scheduled basis to treat for pests. The PHA should be allowed to establish a day of the month when the PHA can enter the unit for this purpose, but without giving notice before each visit.

HUD has not adopted the recommendation to authorize a waiver or exception from the 24-day notice requirement for pest control or other routine functions. The PHA may satisfy the notice requirement by giving definite notice to the tenants of the scheduled dates when the units will be entered for fumigation or other repetitive purposes. The regulation does not require a separate notice for each routine visit, so long as the tenant has received a standing notice of when the visits will be conducted. Similarly, the repair functions where the PHA is not able to schedule a definite appointment, the PHA may give at least 24 hours notice of the period in which the PHA expects that the unit will be entered for performance of the work, such as a notice that the PHA expects to enter the unit for repair work on Thursday or Friday of the week following notice.

Comment states that the rule should require tenant permission for entry to the unit (except in an emergency). The comment notes that while many households are headed by women, most PHA maintenance employees are men. The rule should provide that the tenant may not withhold permission unreasonably (compare Uniform Residential Landlord and Tenant Act, § 3.103(a)).

The final rule provides that the tenant "shall allow the PHA to enter the unit in accordance with the lease" § 966.10(k)(3)). If the PHA seeks admission in accordance with the lease, the tenant is required to admit the PHA representatives. Tenant's refusal to "allow" (i.e., consent) to PHA entry is a violation of the lease. Thus, tenant consent is a prerequisite for PHA entry to the unit. Under the final rule, the PHA may enter the unit "without consent of the Tenant" only if the PHA is entering the unit because of an emergency (§ 966.10(k)(4)).

K. Security Deposit

The old rule provides that a security deposit may not exceed one month's rent or a "reasonable fixed amount" determined by the PHA. The final rule states that a lease may provide for "reasonable security deposits as determined by the PHA in accordance with State and local law" (§ 966.10(e)(3)).

PHA comment states that a PHA should have the right to set the amount of the security deposit. The PHA should have freedom to determine what amount of security deposit is reasonable in accordance with local conditions and State law. The PHA should have the right to increase the security deposit if a tenant damages the unit. This practice protects the PHA from a tenant who damages the dwelling unit, and moves out without notice to the PHA. The PHA should be allowed to require an additional deposit if the tenant makes changes in the unit.

Other comment argues that a requirement that the security deposit must be "reasonable" does not provide sufficient protection for the tenant. Instead, the rule should cap the amount of security deposit which may be collected from a tenant. The deposit should not be more than one month tenant rent. (By Federal law, tenant rent is usually set at 30 per cent of tenant adjusted income.) HUD should establish a specific limit on the amount of security deposit. Some public housing applicants and tenants will not be able to afford the security deposit demanded by the PHA.

HUD concludes that provision that the PHA may determine a "reasonable" security deposit is an adequate standard to govern PHA practice. Further regulatory restriction on the PHA's management discretion is not necessary. In public housing, there should not be a national regulatory restriction which sets a specific and arbitrary formula controlling the amount of security deposit, or which prohibits a security deposit of more than one months' tenant rent, as recommended by some comments. Because the rule allows the PHA to determine what deposit is reasonable, the PHA is able to balance the benefits of holding a tenant security deposit, including the encouragement of tenant responsibility for care of the leased unit, against the difficulty for the tenant in putting up the amount of security deposit demanded by the PHA.

The PHA can tailor the amount of the security deposit to PHA experience and policy in the administration of the local program, as well as PHA experience with the individual tenant. The PHA may require a higher security deposit from a problem tenant, with a history of destructive family behavior, than from a tenant with a history of cooperative and responsible behavior. As suggested by PHA comments, the PHA may demand an increased deposit if the unit has been damaged, or if tenant has made alterations to the unit. The reasonableness of the security deposit amount may therefore be related to the characteristics and behavior of particular families. The PHA does not need to impose a security deposit requirement which is identical for all tenants in the PHA program, or in a project. It should also be noted that since the amount of public housing rent is statutorily determined by income of the individual family, a security deposit formula based on family income will produce different amounts of security deposit for different families. Thus a rent-based security deposit formula may not provide adequate financial security to the PHA, or an adequate incentive for the family to minimize claims against the security people.

In practice, the right of the PHA to determine what amount of deposit is reasonable does not mean that the PHA is free to impose security deposits at any desired level, or at a level that would deny occupancy of the housing to low income families. All public housing units must be occupied by families which are income eligible at the time of initial occupancy. In order to fill public units with eligible families, the PHA will have to set security deposits at a level that can be borne by eligible families.

Public housing security deposit provisions are not the same as the security deposit requirements for the various section 8 programs. In section 8, the landlord is generally a private profit-motivated entity or individual. In public housing, the landlord (i.e., the PHA) is a governmental entity engaged in performance of a public function. The public housing PHA may therefore be vested with a broader discretionary authority to make decisions affecting the welfare of project tenants. In addition, in the various section 8 programs the source of financial protection for the landlord is not limited to the tenant security deposit held by the PHA. In the section 8 programs, the owner may submit a claim for reimbursement from section 8 funds for damages or other monies owed by the tenant (up to the program maximum). In public housing, there is no parallel source of reimbursement and financial protection to the landlord-PHA.

The old lease and grievance rule states that the lease may allow for gradual accumulation of the security deposit by the tenant and refund of interest earned on security deposits. This provision is not included in the revised rule. Provisions allowing gradual accumulation of deposits, and the refund of interest on deposits, are unnecessary. Nothing in the rule prohibits either practice.

L. Prohibited Lease Provisions

1. Retention of Prohibition

Section 6(l)(1) of the U.S. Housing Act of 1937, as enacted in the 1983 law, provides that a public housing PHA must use leases which "do not contain unreasonable terms and conditions" (42 U.S.C. 1437d(l)(1)). This provision is worded like section 202(b)(3) of the Housing and Community Development amendments of 1978 (Pub. L. 95–557, October 31, 1978), which requires HUD to assure that leases approved by HUD for certain HUD-subsidized multifamily housing programs do not contain unreasonable terms and conditions. The listing of prohibited types of lease provisions promulgated by HUD for these programs 48 FR at 43310, September 23, 1983) is almost the same as the enumeration of prohibited lease provisions in the old public housing lease and grievance rule.

Consistent with the 1983 statutory requirement, and with requirements for other HUD housing subsidy programs, the rule describes the types of provisions which may not be included in a public housing lease (§ 966.11). For the most part, the statement of prohibited provisions bars lease language which could compromise or foreclose the tenant's opportunity for a fair hearing in a State court eviction proceeding, or other court action in connection with the lease.

The statement of prohibited provisions is substantively very similar to the prohibited lease provisions in the old rule. However, the rule now incorporates a number of refinements in the list of prohibited provisions, including changes to make the statement easier to understand. The proposed changes do not substantially impair the common approach in different HUD housing subsidy programs. Public comment generally approves HUD's revision to the statement of prohibited lease provisions.

The rule does not include specific lease language which conforms with the regulatory list of prohibited lease provisions. The PHA is responsible for drafting the language of the lease, and of assuring that the lease does not include any prohibited provision.

Public comment, including comments by PHAs and NAHRO, supports the prohibition of unreasonable lease provisions. However, some comment notes that State law may also provide a similar protection for the tenant, and that the PHA should have maximum responsibility in drafting language of the lease in accordance with State law.

2. Treatment of Family Property

Separate old rule provisions restricting the PHA's authority to hold or sell property of the family are combined and revised (final rule § 966.11(b); see old rule § 966.6(b) on "distraint" for rent and charges, and old rule § 966.6(e) on disposition of family property without a court decision).

The old rule prohibits a lease provision which would authorize the PHA to hold or sell tenant property without notice to tenant and a court decision. PHA comment points out that because of this prohibition, the PHA is not able to dispose of abandoned property when the tenant vacates the unit. The PHA is put to the expense of storing the abandoned property, which is usually junk. PHA comment states that because of the prohibition, the PHA is forced to wait until the end of the eviction proceeding, and place remaining possessions at the curb. The provision causes increased expenses and lost rent revenues.

Comments states that the PHA should be allowed to dispose of abandoned property left by the tenant. Comment suggests alternative techniques for handling the abandoned property: disposition in accordance with State law, disposition with court approval, or disposition in a commercially reasonable manner. The lease should include a provision which allows the PHA to dispose of abandoned property. The prohibition on seizure or sale of tenant property should not apply to abandoned apartments.

HUD concurs that limitations on PHA handling of property abandoned in the unit are not supported by the underlying rationale of the prohibited lease provisions, or, more particularly, of the prohibited provisions concerning treatment of family property. The prohibition is essentially designed to prevent the seizure or sale of property in the possession of the family, as a PHA self-help remedy for disputes arising under the lease. Once the family vacates the unit and property, the abandoned personal property is no longer in possession of the family. The hindrance of PHA disposition of abandoned property is an unintended and undesirable artifact of a provision designed for a different purpose, and results in unnecessary expense and nuisance for the PHA. In response to PHA comment, the provision on treatment of family property is revised, with the effect that the prohibition does not apply to an agreement concerning disposition of personal property abandoned in the unit.

As revised, the final rule provides (§ 966.11(b)) that the lease may not include a provision on treatment of family property under which the tenant agrees:

> * * * that the PHA may take, hold or sell personal property of Household members, without notice to the Tenant and a court decision on the rights of the parties. However, the prohibition of such agreement does not apply to an agreement by the Tenant concerning disposition of personal property remaining in the dwelling unit after the Tenant has moved out of the unit. The PHA may dispose of such personal property in accordance with State law.

Legal aid comment states that State law may permit a contractual lien on tenant possessions if the rent is not paid. This State-created lien is a self-help remedy by the owner, that does not give a tenant the opportunity for a judicial hearing. The final rule prohibits an agreement in the lease that the PHA may take or sell family property without notice to the tenant and a court decision on the rights of the parties.

3. Waiver of Notice

The old rule prohibition against a waiver of legal notice is clarified and broadened. The old rule prohibits waiving notice of an action for eviction or a money judgment. Similarly, the new rule prohibits an agreement that the PHA does not need to give notice of a court proceeding against the tenant in connection with the lease (§ 966.11(d)). However, the new rule also prohibits an agreement to waive any notice required by HUD. Thus, the tenant may not be required to relinquish in the lease the right to notice of PHA charges (§ 966.10(e)(1)(ii)), of a change in rent (§ 966.10(c)(2)), of lease termination (§ 966.22) or of proposed adverse action (§ 966.31(b)), or to the notice procedures required under the rule (§ 966.10(l)).

4. Waiver of Court Decision Before Eviction

The prohibition against waiver of the opportunity for judicial determination on an eviction is clarified (§ 966.11(e)). The new rule prohibits an agreement by the tenant that:

> the PHA may evict Household members (1) without instituting a civil court proceeding in which the Tenant has the opportunity to present a defense, or (2) before a decision by the court on the rights of the parties.

The new language is intended to express more fully the prohibition of any lease provision which would deny the family the opportunity for a fair hearing in court before eviction from the unit. This provision supports other related provisions of the rule (§ 966.22(b)(4); § 966.23(a)).

5. Other Revisions of Prohibited Lease Provisions

For clarity, the prohibition of "exculpatory clauses" (old rule § 966.6(c)) is redesignated as a prohibition of a clause "excusing PHA from responsibility" (new rule § 966.11(c)).

The rule includes other editorial changes and refinements in the list of prohibited provisions.

M. Distinction Between "Tenant", "Family" and "Household"

1. General

The old rule uses the term "tenant" to designate the lessee of a public housing unit. The tenant is the party who enters into a lease with the PHA on behalf of the family (see old rule § 966.4). The tenant is also the party who possesses the right to a grievance hearing. In some contexts, the old rule refers to members of the tenant's "household", i.e., the body of family members residing in the unit under the lease.

In the required and prohibited lease provisions of the old rule (old rule Part 966, Subpart A), the term "tenant" is not explicitly defined. However, the term is defined for purpose of the grievance requirements (old rule Part 966, Subpart B). In that context, "tenant" is defined as the "lessee or the remaining head of household" (old rule § 996.53(f)).

The final rule gives separate definitions of the terms "tenant" and "household" (new rule § 966.2). The new definitions express the important technical distinction between the lessee of the unit (the "tenant"), and the whole body of persons who are approved to live in the unit under the lease (the "household"). This distinction is also implicit in the old rule. The new definitions apply to all parts of the revised lease and grievance requirements, including the lease requirements, the provisions on termination of tenancy, and the grievance hearing requirements.

By law, public housing is for the benefit of a "family" (U.S. Housing Act of 1937, 42 U.S.C. 1437 *et seq.*). In this rule, the term "tenant" is defined to denote the legal representative of an assisted family: "the person or persons who execute the lease with the PHA" (§ 996.2). As in conventional landlord-tenant usage and practice, the "tenant" is the person who holds the contractual right to occupancy under the lease, and the right to enforce the obligations of the landlord under the lease (the PHA). The tenant is contractually bound to perform all tenant obligations under the lease.

The proposed rule contained a separate definition of the term "family". This proposed definition compressed two distinct concepts: the proposition that unit occupants must be approved by the PHA, and the proposition that the unit occupants must be a statutory "family" as determined in accordance with HUD requirements, the statutory entity eligible for public housing assistance (see (United States Housing Act of 1937, section 3, 42 U.S.C. 1437a; cf. 24 CFR Part 912). However, the group of approved occupants sometimes includes a person who is not a member of the statutory "family". A live-in aide may reside in the unit to provide care and assistance to an elderly family (U.S. Housing Act of 1937, section 3(b)(3), 42 U.S.C. 1437a(b)(3); § 966.10(g)(2)).

For greater precision, the final rule distinguishes the concepts of "family" and "household". The defined term "household" (§ 966.2) refers to the whole body of unit occupants who are allowed to live in the unit under the lease with the PHA (including a live-in aide):

> *Household.* The Tenant and other persons who live in the dwelling unit with written approval of the PHA.

(See also, § 966.10(b)(1), which provides that the lease must state "the persons who will live in the dwelling unit".) Most lease provisions concern all unit occupants, as opposed to "family" occupants. For example, the lease provides that members of the "household" may not engage in criminal activity in the unit or premises (§ 966.10(h)(2)(iii)). In this context, it is irrelevant whether the household member is also a member of the "family". In most cases, the set of household members is identical with the family.

In a few contexts, the rule refers to the "family". A number of provisions refer to the reexamination of "family" income and composition; statutory rent is based on income and composition of the family. However, the term "family" is not defined in this rule. First, the lease provisions do not define what persons or body of persons are eligible for assistance, although the PHA must determine statutory eligibility before admitting the family to occupancy of the unit. Second, HUD does not prescribe, in this or any other public housing rule, a comprehensive definition of when a group of persons may be treated by the PHA as a "family" which is eligible for assistance under the public housing program. (HUD regulations only define when an elderly or other single person may qualify as a "family" (see § 912.2).) The PHA has broad discretion to determine what group of persons constitute a family. This rule is not intended to limit or affect PHA authority in this regard.

Throughout the rule, the defined terms "tenant" and "household" are used in the appropriate contexts. For example, the lease provides that the "tenant" shall have the right to exclusive use and occupancy of the dwelling unit "for residence by the Household" (§ 966.10(g)(1)). During the lease term, the PHA may offer the "tenant" a new lease or revision of the lease (§ 966.10(o)(1)).

Public comments object to the explicit regulatory distinction between the tenant and the family under the proposed rule. Comment is concerned with the supposed effects of this distinction on rights of family members other than the tenant signatory, including concerns respecting notice under the lease, and the rights of other family members if the tenant leaves the unit. In the final rule, the central distinction between the tenant signatory and the whole body of unit occupants is retained (although, as indicated above, the terminology has been changed).

2. Rights of Other Family Members

Comment claims that the separate definition of the terms tenant and family denies tenant rights and protections to other family members. Comment states that the family-tenant distinction is artificial since a family is the entity which is eligible for public housing. The PHA should be required to include as parties to the lease all family members, or all adult family members, or all family members who want to sign the lease. The PHA should have "privity of contract" with each adult member of the household.

In HUD's view, the distinction between the person who signs the lease with the landlord, and the body of people who live in the unit in accordance with the lease, is not artificial, but is a real-world distinction that antedates the explicit regulatory definition of these concepts in the new rule. This distinction existed implicitly in implementation of the old rule, notwithstanding the absence of a consistent regulatory definition which applied across the lease and grievance requirements. For example, the lease requirements of the old rule state that the dwelling unit may only be used as a dwelling for the "tenant" and "the tenant's household" (old rule § 966.4(f)(3)). In ordinary landlord-tenant practice, the term "tenant" conventionally applies only to the individual or individuals who execute the lease for a unit, not to all of the individuals who may reside in the unit. A residential lease commonly lists the people who may live in the unit.

The new rule introduces an explicit definition of the distinction between the lessee and the unit occupants. By a conscious and consistent use of the defined terms, the new rule clarifies the intended operation of lease and grievance provisions which use the defined terms, and thus the rights and duties of the tenant under the lease and under the PHA grievance procedure. As under a private market lease, the tenant is the party who holds the contractual right to enforce the lease. The lease provisions required by this rule are not intended to make the non-tenant family members third party beneficiaries, who may directly enforce the obligations of the lease against the PHA.

For administration of the lease, the PHA needs a precise legal definition of the tenant who is the subject of rights and duties under the lease. It is both practical, and consistent with normal landlord-tenant practice, that certain members of the family act as legal representatives of the family. There is nothing in the lease requirements of the 1983 law which alters the normal expectation that the "tenant" is the repository of contractual rights under the lease. In public housing, assistance is for the benefit of a "family". This circumstance supports the implication that the PHA may treat the family as a group, represented by the individual or individuals who executes the lease on behalf of the family, not merely as a collection of individuals residing in the unit.

Under the final rule, the PHA will have the authority to determine which family members will be required or allowed to sign the lease on behalf of the family. This judgment may be legitimately affected by elements of local law and landlord tenant practice, for example, the age of contractual responsibility under State law, or procedural complications by addition of additional signatories under the lease. There is no present reason for establishing a Federal rule defining which family members sign the public housing lease as representatives of the assisted family.

The public housing lease establishes a single tenancy, for the benefit of the whole family. The leasehold is not a set of separate leases for each individual who lives in the unit. For the most part, the determination of which member or members of the family signs the lease as "tenant" on behalf of the family is of little practical importance. Regardless of who signs the lease, public housing rent is based on the income of the whole family, and all members of the family may be evicted if the rent is not paid. Similarly, the whole family may be evicted for breach of tenant obligations by any member of the family. In general, the family's security of occupancy is little affected by who happens to execute the lease as legal representative of the assisted family.

Comment expresses concern that the tenant-family distinction will in some fashion deny to family members other than the tenant the protection against prohibited lease provisions. However, HUD notes that the tenant-family distinction, or the tenant-household distinction, does not permit the PHA to evade the prohibited lease provisions for family members other than the tenant. By virtue of the prohibited lease provisions, certain types of provisions may not be included in the lease between the PHA and tenant. The tenant is not bound by agreement of other family members to relinquish leasehold protections in contravention of prohibited lease provisions. The tenant's tenure of the unit for occupancy by family members is not affected by any side-agreements between the PHA and other family members.

3. Notice

The rule describes how the PHA must serve notice of lease termination or notice of a proposed adverse action (§ 966.10(l)(2)(ii)). Notice must be served on the "tenant", the person who executes a lease on behalf of the family.

Comment states that individual family members should be given separate notices, or that notices should be directed to the tenant "and family". Comment claims that if notice is only given to the "tenant", the family may have no notice that legal rights are being terminated.

There is a single lease for each family. Similarly, issues which are cognizable under the PHA grievance procedure pertain to the whole family (e.g., computation of family rent), and the tenant has a unitary right to grieve on each grievable issue. Individual family members do not have separate individual leases or separate individual rights to grieve on a proposed adverse action by the PHA (e.g., a proposed termination of the tenant's lease). Corresponding to the unitary character of the rights which are protected by the lease, and by the PHA grievance procedure, the rule requires a single notice to the tenant, rather than separate notices to individual family members. The tenant is the legal representative of the family, both for purposes of the lease and for purposes of the grievance procedure.

Comment states that notice should be given to individual family members. Mechanically, this could mean either that notice is given by multiple separate notices to the individual members, or that a single notice is addressed to more individuals or to the "family".

Multiple notices to an individual family will evidently multiply the burden and expense of giving a notice (of adverse action or lease termination) which is required under the 1983 law. Imposition of this extra burden and expense is not justified. Multiplication of the number of individual notices does not multiply the underlying right which is protected by the notice. Indeed, the use of separate notices to individual family members would lead to confusion as to who is entitled to act for the family. HUD does not believe that the use of multiple notices will substantially increase the likelihood of actual notice to the family, and—most important—the likelihood of effective action to protect family interests. PHAs are already burdened by substantial procedural requirements not borne by a private landlord, including the duty to give notice of lease termination or notice of adverse action in accordance with the 1983 law. HUD will not add to that burden by requiring the PHA to give multiple notices to an individual family.

Adding additional names as addressees of a single notice to the assisted family does not impose the same administrative burden and expense as multiple separate notices to the family. However, HUD does not believe that a requirement to address additional family members is likely to produce any substantial benefit. As already remarked, there is only one lease and one right to grieve, not separate rights for each member of the family. All notice should go to the tenant—who is the only family member who may exercise rights under the lease or the PHA grievance procedure.

4. Rights of Remaining Family Members

Comment claims that the tenant-family definitions prejudice the interest of family members remaining in the unit after death or departure of the "tenant". Comment objects that the tenant is the only family member who is entitled to legal notice and continued possession of the unit. If the husband-tenant dies or leaves the unit, the wife and child have no legal right to continued occupancy. If a grandparent-tenant dies or leaves, the fate of remaining family members is left to the "whimsey" of the project manager. Comment notes that the goal of the public housing law is to provide decent, safe and sanitary housing for "families". If a family is devastated by loss of an adult member, or if composition of the family is changed by divorce, family stability should not be undermined by loss of the only housing the family can afford.

Comment states that other family members should be allowed to remain in the unit after departure of the tenant if the remaining family members meet established PHA occupancy criteria—such as whether the remaining family member is a PHA-approved occupant who has lived continuously in the unit, and is a blood relation of the named lessee. Comment states that remaining family members should automatically succeed to rights of the tenant, and that a new lease should not be required. Other comment asks clarification whether a remaining person is automatically eligible to sign a new lease. Comment suggests that the treatment of remaining family members should be left to PHA discretion.

In this rulemaking, HUD did not propose any substantive change in the rights of remaining family members after death or departure of the tenant-lessee. The introduction of the new definition of term "tenant" does not substantially alter the position of remaining family members under the old rule and other prior HUD regulatory requirements.

Under the U.S. Housing Act of 1937 assistance is provided to a "family". The statutory term "family" is defined to include the "remaining member of a tenant family" (U.S. Housing Act of 1937, section 3(b)(3)(C), 42 U.S.C. 1437a(b)(3)(C)). Under the statutory definition, the remaining member or members of the original family (after departure of the tenant or other family members) constitutes an entity within the statutory definition of "family", and therefore an entity which is statutorily eligible for public housing assistance.

However, the existence of statutory eligibility does not mean that the remaining family members (or the remaining adult members) should automatically succeed to the interests of the prior lessee. Nor does it mean that the PHA is or should be required to offer a new lease to remaining members of the family. The PHA may only admit a family if the family is eligible. However, the PHA is also charged with the crucial management responsibility and discretion to decide whether the remaining members of a family, as presently constituted after departure of the original tenant, should be assisted, either in the same unit or another unit.

After departure of the original tenant, the PHA has a legitimate management interest in determining whether the remaining family members constitute a viable or stable household, or whether continued occupancy by the family presents dangers to other residents or the project, or to the welfare of family members (for example, if there is no adult who can undertake to act as tenant and head of household, and care for minor members of the family). As at the point of initial admission, the PHA may consider that the presence of a reliable household head is essential for continued occupancy by the family. Remaining family members may not include any non-minor with legal capacity to execute a lease, or may not include any persons who can serve as the stable core of the reconstituted family, and who can answer for the legal responsibilities of tenant under the lease.

As indicated by public comment, death or departure of the named tenant often presents profound difficulties to the remaining family members. In these varied situations, the PHA has the hard job of deciding whether the remaining members can stay in the unit. However, as under the old lease and grievance rule, the decision on the appropriate solution is properly vested in the administrative discretion of the PHA. In practice, most PHAs are probably inclined to permit continued occupancy by remaining family members unless there is a compelling reason to refuse continued occupancy by the family.

N. General Notice Procedures

During the lease term, the PHA and the tenant need a mechanism to give notice to each other on subjects related to the tenancy under the lease. For example, the PHA may give notice of a reexamination of family income, or of the new rent determined as a result of reexamination. The tenant may give notice that the tenant requests a grievance hearing on the PHA's proposed determination of tenant rent.

The rule provides (§ 966.10(l)(1)):

"The PHA shall adopt a notice procedure which is consistent with State and local law, and which shall be incorporated into the lease. The notice procedure shall state how the PHA and Tenant may give notice to each other concerning termination of the lease, and other matters under the lease".

O. Notice of Adverse Action or Lease Termination—How Served

1. Service of Statutory Notice—Methods

The PHA must give the tenant notice of lease termination (§ 966.22), or notice of a proposed adverse action (§ 966.31(b)). These notices implement statutory requirements under the 1983 law. The PHA must give minimum notice of lease termination (U.S. Housing Act of 1937, section 6(l)(3), 42 U.S.C. 1437d(l)(3)). The tenant must also be advised of the specific grounds of any proposed adverse action by the PHA (U.S. Housing Act of 1937, section 6(k)(1), 42 U.S.C. 1437d(k)(1)). A notice of adverse action informs the tenant of the reasons for a proposed adverse action (§ 966.31(b)(1)(i)). The rule establishes the same procedures for service on the tenant of both types of notice required under the 1983 law (§ 966.10(l)(2)(ii)).

A PHA may use any one of three alternative methods to serve the notice. The rule provides (§ 966.10(l)(2)(ii)) that a notice of lease termination, or a notice of proposed adverse action, shall be given to the tenant:

> (A) by mailing the notice by first class mail addressed to the Tenant at the dwelling unit, or
>
> (B) by handing a copy of the notice to the Tenant or to any adult answering the door at the dwelling unit, or
>
> (C) by other means which the PHA determines to be reasonably likely to give the Tenant actual notice. Posting on the outside of the unit door, and which is not supported by other notice to the Tenant does not constitute sufficient notice.

2. Notice by Mail

a. When Notice Is Effective. If notice is mailed, the PHA does not have direct knowledge of the date when the notice is received by the tenant. For a notice of lease termination, a tenant must be given notice of lease termination for the minimum periods stated in the 1983 law (e.g., 14 days notice of termination for non-payment). It is therefore helpful to specify when the mailed notice is deemed effective, starting the countdown of the 14 day notice period.

The proposed rule contains provisions which specify the point at which a notice sent by mail is effective. The proposed rule provides that a mailed notice (of adverse action or lease termination) is "deemed given" five days after the notice is mailed by first class mail. The five day notice period was intended to allow time for the tenant to receive the notice through the mails, and define the time at which the termination notice is legally effective.

PHA comment states that the five day notice period is excessive allowance for delivery by first class mail. Legal aid comment recommends adding an additional five days for response by the tenant.

PHA comment accurately points out that the proposed five day initial period (running from the date of mailing to the date when the notice is "deemed given") effectively lengthens the notice of lease termination required by the statute (running from the date the notice is given to the date of lease termination) (U.S. Housing Act of 1937, section 6(l)(3), 42 U.S.C. 1437d(l)(3)), § 966.22(a)). The initial notice period would be added on top of the statutory notice of lease termination. In this way, the PHA would have to give 19 days notice of lease termination for nonpayment of rent (14 days statutory notice, plus a 5 day period for delivery of the notice), and 35 days notice of lease termination in other cases (30 days statutory notice, plus a 5 day delivery period).

PHA comment states that the additional 5 day delivery period delays PHA action which is necessary to collect rent or deal with residents who create disturbances, or are otherwise a detriment to the health and safety of staff and other residents. These delays are costly, and increase tenant receivables and collection losses. HUD requirements in the old rule already give the tenants too long to pay. The rule should not give the tenants more time. Comment remarks that the new notice period requirement is pyramided on top of the time necessary to accomplish other steps to initiate legal action and schedule a hearing for tenant non-payment (PHA grace period, delivery period, 14 days notice of lease termination, period for scheduling court hearing).

In response to the public comment, the rule is revised to provide that a notice of lease termination or notice of proposed adverse action is treated as given when mailed. The rule provides (§ 966.10(1)(2)(iii)):

> If a notice of lease termination or a notice of proposed adverse action is sent by mail, the notice is deemed given when mailed.

Allowance of an initial period for delivery of the lease termination notice (in addition to the statutory lease termination notice periods specified in section 6(l)(3) of the U.S. Housing Act of 1937, 42 U.S.C. 1437d(l)(3)) is not required under the 1983 law. The old rule did not require that the PHA make any additional allowance of a period for delivery of a lease termination notice which is sent by mail. The lease termination notice provisions in the 1983 law codify the notice requirements in the old rule. The 1983 House Committee Report states that the bill requires that the lease contain certain basic protections, including:

> * * * clauses obliging PHAs to * * * provide adequate notice before evicting tenants. The Committee also contemplates that HUD will retain the existing regulations regarding these provisions (Report 98-123 on H.R. 1, p. 36).

(Provisions on public housing leases, including provisions which require the PHA to give notice of lease termination, were enacted verbatim in the form reported by the House Committee. These provisions therefore differ from the grievance hearing requirements, which were substantially modified in the law as finally passed.)

b. Use of Registered or Certified Mail. The proposed rule states that where the notice is mailed, the notice is "deemed given" (1) five days after mailing, or (2) when sent return receipt requested, the date of actual receipt as stated on the return receipt. PHA comments note significant technical problems with this provision when the notice is sent by registered or certified mail. PHAs request clarification that a notice by registered or certified mail is effective no later than the effective date for a notice sent by regular mail.

Under the final rule, a notice is deemed given at the time the notice is mailed (rather than five days *after* mailing) (§ 966.10(l)(2)(iii)). The same simple rule applies to registered or certified mail as to ordinary mail. The final rule does not include the proposed provision which would make the notice effective upon the actual receipt date shown on a return receipt. This provision is not needed, since the notice is effective when mailed.

Some comment states that notice should always be sent by registered or certified mail. Other comment points out that tenants often refuse to accept registered or certified mail, since such mail often contains a legal notice or claim. PHA comment states that notice by registered or certified mail is prohibitively expensive.

The rule does not require use of registered or certified mail. In a court proceeding for eviction, the PHA will have to prove that the PHA has given the tenant the notice required by Federal law, including satisfaction of the minimum notice periods under the statute and regulation. The Department considers it unnecessary to specify, as a matter of Federal regulation, the form of proof to be offered by the PHA (by affidavit of service, return receipt, testimony or other probative means), just as the Department does not seek to prescribe the manner in which the PHA must prove the factual existence of good cause grounds as required under the statute. Each PHA may decide whether it is best to give notice by registered or certified mail, or by ordinary mail, or by other authorized methods of service.

3. Notice by Personal Service

The rule provides that the PHA may serve a notice of lease termination or proposed adverse action "by handing a copy of the notice to the Tenant or to any adult answering the door at the dwelling unit" (§ 966.10(l)(2)(ii)(B)).

The December 1982 proposed rule would have allowed service by delivering a copy of the notice to any person answering the door at the dwelling unit. Comment states that the PHA should not be permitted to serve notice on a child who answers the door. In response to this comment, the rule was revised to provide that the PHA may only serve the notice on an adult who answers the door. HUD agrees that service of notice on a minor child who answers the door, and not supported by some other form of notice to the tenant, may not not provide adequate notice. If the PHA is unable to serve an adult at the dwelling unit, the PHA can use an alternative mode of service allowed under the rule, such as service by mail.

The old rule provided that notice must be delivered to the tenant, or to an adult member of the tenant's household residing in the dwelling unit. Comment on the December 1982 rule objects to allowing the PHA to leave notice with any adult who answers the door, and states that the rule should require service on an adult member of the household, as under the old rule. Delivery to any adult in the unit does not afford a sufficient likelihood of actual notice. Comment asks how the person delivering the notice is to know the age of a person who answers the door.

The final rule allows the PHA to make service on any adult who answers the door. HUD believes that in most cases such service will provide actual notice to the tenant, regardless of whether the person is a member of the household. Indeed, it is doubtful that service on a household member other than the tenant is more likely to provide actual notice than service on any adult who answers the door.

HUD recognizes that a person who answers the unit door may be an unauthorized occupant of the unit. Some PHAs have high levels of occupancy by persons not admitted by the PHA. However, it is fair that a tenant who permits illegal occupancy should bear the risk that these persons may not inform the tenant of PHA notices.

In many projects, a PHA representative who serves the notice may not know the family members. Consequently, the server may not know whether a person who answers the door is a member of the household, i.e., a person whose occupancy in the unit is approved by the PHA. The server also may not know, other than by appearance and common sense judgment, whether the person who answers the door is a minor.

The PHA should not be burdened with the necessity of determining or proving that an adult who opens the door to the unit is a member of the household. In most cases, the person will be a member of the household, or a person who will pass the notice on to members of the household. Thus this mode of service is reasonably likely to give the tenant actual knowledge of the PHA notice. If notice is handed to a person other than a member of the household, the person is usually in the unit with consent of household members. The risk that such a person may not transmit the notice to the tenant is most reasonably apportioned to the tenant who granted the person access to the unit, either as an illegal occupant or as a guest of the family.

There is some risk that in some cases the PHA representative may not know if the person who opens the door is a minor. However, this problem may arise in relatively few cases. In many cases, the server will know, without serious ground of doubt, that the person who answers the unit door is an adult. In other cases, it will be equally clear that the person who answers the door is a minor. The problem therefore only arises in the limited proportion of cases where it is not clear to the server that the person is either a minor or an adult. In such cases, the problem may often be solved by further inquiry, or by re-serving the notice at another time, when the tenant or another adult is present. Alternatively, the PHA may solve the problem by serving the notice by some other authorized means, commonly by sending the notice by first class mail addressed to the tenant.

4. Notice by Other Means

The proposed and the final rule provide that the PHA may make service "by other means which the PHA *determines to be reasonably likely to give the Tenant actual notice*" (§ 966.10(l)(2)(ii)(C)) (emphasis supplied). Legal aid comment contends that this formula would allow the PHA to make service by posting notice on the unit door, a service technique held unconstitutional by the Supreme Court in *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874 (1982). Comment also claims that the rule will allow eviction without actual notice, and will result in sewer service. HUD should require service of notice in-hand or by return receipt notice.

In the *Greene* case, the Supreme Court held that posting of an eviction notice on the apartment door of housing project residents does not satisfy minimum standards of procedural due process. The Court states that due process in any proceeding which is to be accorded finality is notice which is "reasonably calculated, under all the circumstances" to give actual notice of the proceeding (456 U.S. at 449, 102 S. Ct. at 1878).

The service standard stated in the HUD rule (for use of a service technique other than mail, or delivery of notice to an adult who answers the unit door) is a close restatement of the Constitutional standard enunciated in *Greene*. The rule directs that the alternative service technique used by the PHA must be reasonably calculated to provide actual notice. Since posting on the unit door (not supported by other means of giving notice) is not a technique which is reasonably likely to give actual notice, such service is not permitted under the standard stated in the proposed and final rule.

Nevertheless, because the question was raised in public comment, and for absolute clarity as to HUD's intention, the final rule adds—in addition to the general standard governing adequacy of alternative service techniques—an explicit statement that "posting on the outside of the unit door, and which is not supported by other notice to the Tenant, does not constitute sufficient notice" (§ 966.10(l)(2)(ii)(C)). The final rule retains the general standard in the form previously stated, since the standard is necessary for evaluation of the adequacy of alternative service techniques not specifically described in the rule.

Comment objects to allowing the PHA to make service by sliding the notice under or through the door. The rule does not mention or prohibit service by sliding the notice under or through the door. For alternative modes of service not described in the proposed rule, the question is whether the PHA determines that the method of service used by the PHA is "reasonably likely" to give actual notice to the tenant.

All of the service techniques allowed under the rule meet the standards of procedural due process as they would be applied to a proceeding for deprivation of tenant's right to occupancy of the property. However, HUD believes that the standards for service of a notice of adverse action, or of a notice of lease termination, are not subject to due process requirements, since they are not necessary to assure a due process hearing before deprivation of the tenant's property right to occupancy of the unit. The rule provides that a PHA may only evict the family from the dwelling unit through a civil judicial proceeding in which the family has the opportunity to present a defense (§ 966.23(a)). The judicial procedure for eviction of the tenant is subject to all the panoply of procedural due process, including the Constitutional requirements for adequate notice of the eviction proceeding. The instant rule does not attempt to prescribe notice procedures respecting the State judicial proceeding for eviction of the tenant. Those notice procedures are established by State law, and are subject to due process requirements under the Fourteenth amendment.

Under the 1983 law, the tenant has a statutory right to notice of lease termination. Satisfaction of this Federal notice requirement is a statutory and regulatory prerequisite for termination of the lease and eviction of the tenant. Similarly, the tenant has a statutory and regulatory right to notice of a proposed adverse action. The question respecting adequacy of the process for service of these statutory notices is whether the notice procedure satisfies the statute and regulation. However, since the statutory notice does not finally determine the tenant's right to continued occupancy of the unit (which is determined in the judicial proceeding for eviction of the tenant, after Constitutional notice and opportunity to be heard) the adequacy of the statutory lease termination notice is not tested by Constitutional standards for procedural due process, but by consistency with the statute and regulation.

The rule provides that service must be by other means which "The PHA determines" are reasonably likely to give actual notice. This does not mean that PHA discretion to determine adequacy of alternative means of service is absolute. The PHA determination is subject to judicial review, under Constitutional, statutory or common law principles governing review of administrative action.

5. Notice to Handicapped

A tenant may be handicapped. The final rule adds a new provision which encourages the PHA to give supplemental notice to a handicapped tenant if the PHA has reason to believe that the ordinary forms of notice may not give actual notice to a handicapped tenant. Section 966.10(l)(3) provides that:

> If the PHA believes that the notice procedure otherwise used by the PHA may not give adequate notice to handicapped Tenants, the PHA notice procedure may incorporate additional procedures for giving notice to such Tenants.

6. Relation Between Forms of Notice

Comment states that the PHA should be required to attempt personal service, before using mailing or another method of service. Comment also states that the PHA should combine notice by mail with another service method likely to provide actual notice to the tenant, such as personal service or service at the dwelling.

Notice by mail, or by any of the other service procedures authorized in this rule, will generally communicate actual notice to the tenant. Any of the authorized services techniques is likely give adequate notice to the tenant.

HUD finds no justification for preferring one service technique to another, or for requiring use of one type of permitted service before using another type of service. HUD does not require that the PHA attempt personal service before trying another type of service. A requirement that the PHA must first try to make personal service would delay PHA action to terminate the lease, or take adverse action. The requirement would also impose a considerable administrative burden on the PHA.

HUD also will not require that mailed service must be supplemented by service through other means. Mailed service is generally an effective procedure for notice to the tenant.

7. State Law Requirements for Serving Termination Notice

Comment states that a notice of termination of tenancy under the rule should be given in accordance with State or local law, instead of federally imposed standards. The service requirements stated in this rule are intended to assure that the tenant has "adequate written notice" of lease termination, as required by section 6(l)(3) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(l)(3)), and to give the family notice of proposed adverse action (pursuant to section 6(k) of the U.S. Housing Act of 1937, 42 U.S.C. 1437d(k)).

The HUD regulation does not override service requirements imposed by State law. For termination of tenancy and eviction of the unit occupants, the PHA must satisfy any notice requirements imposed by State law and procedure. State law notices must be given in compliance with State law. Notices required in connection with the judicial termination procedure under State law must of course fulfill the requirements of procedural due process.

P. Tenant Comment on Lease Form or PHA Rules

The rule eliminates old rule requirements that a PHA allow 30 days for tenant comment on changes in the PHA lease form (old rule § 966.3), or on changes in PHA rules or schedules of PHA special charges (old rule § 995.5). Legal aid comment objects to the elimination of tenant comment requirements. PHA comment supports this revision of the rule.

Legal aid comment notes that tenants are affected by changes in the PHA lease and rules. The tenants should have the opportunity for basic input into a document which governs how they live. They are best able to determine the effect of PHA rules, and to propose alternatives. The elimination of tenant comment deprives the tenant of a meaningful opportunity for input.

Legal aid comment states that giving tenants a chance to comment on proposed revisions of the PHA lease form or PHA rules is good management practice, and creates a better dialogue between the PHA and its tenants. PHA commissioners are not intimately familiar with how the lease is administered. Consideration of tenant comment, as required by the old rule, improves the lease used by the PHA, but permits the PHA to implement necessary policies. PHAs often make changes requested by the tenants. The 30 day period for tenant comment does not cause significant delay in implementation of justifiable changes in the PHA lease or rules. Under the old rule, the PHA is not forced to accept a tenant comment, only to explain the proposed change and solicit tenant reaction. This process avoids misunderstanding and tension. The PHA and the tenants benefit from weeding out unworkable proposals.

PHA comment approves removal of the old rule requirement to offer opportunity for tenant comment on changes in the PHA lease form or PHA rules. The old rule tenant comment requirement was an exercise in futility. Elimination of the tenant comment requirement will allow the PHA to change the lease or PHA rules more quickly. Lease changes are often required by HUD, and the lease changes which are directed by HUD may not be modified in response to tenant comment. PHA house rules and charges must be kept current with changing circumstances. However, a PHA comment notes that the PHA intends to continuing offering a 30 day opportunity for public comment, whether or not required by HUD.

The new rule does not retain the requirement to give the tenant an opportunity to comment on the PHA's adoption of a new lease form, or on changes in PHA schedules or rules. The degree and type of consultation with project residents is decided by the PHA, in the light of local circumstances. HUD does not have sufficient reason to impose a broad Federal requirement that PHAs allow tenant comment on revisions in the PHA lease form, or in PHA schedules and rules. (Section 965.473(c) requires a PHA to allow tenant comment before changing the PHA allowances for PHA-furnished and tenant-purchased utilities.)

It may be that giving tenants a full chance to comment and to be consulted on changes in PHA rules or lease forms is often good management practice, and may improve relations between the PHA and tenants. However, the national public housing rule does not seek to mandate all aspects of a presumed good management practice. The rule leaves much to the discretion and good management judgment of the PHA, in the spirit of the statutory objective of allowing a PHA maximum local responsibility in administration of its programs (U.S. Housing Act of 1937, section 2, 42 U.S.C. 1437). A procedure for soliciting tenant comment on a new lease or PHA rule is most useful if employed at the free volition of the PHA, and not for compliance with a Federal requirement.

Some comment asserts that elimination of tenant comment requirements is inconsistent with Federal statutory requirements for tenant participation in subsidized housing. Section 202 of the Housing and Community Development Amendments of 1978 (Pub. L. 95-557, October 1, 1978, 12 U.S.C. 1715z-1b) provides that tenants in certain HUD-subsidized multifamily projects must have an opportunity to comment on requests by a project owner to HUD for approval of certain procedures (such as the owner's request for a rent increase). This statute does not apply to public housing. For the programs covered by section 202, the statute does not require opportunity for tenant participation concerning a change in the lease form or project rules.

Comment suggests that the removal of tenant comment procedures is somehow contrary to the intent of Congress in section 6(c)(4)(C) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(c)(4)(C)). This law provides that a PHA must comply with procedures and requirements prescribed by HUD for sound management of public housing projects, including establishment of effective tenant-management relationships designed to assure satisfactory standards of tenant security and project maintenance. The law does not require that tenant must be given opportunity to comment on the PHA lease form or PHA rules.

Comment also cites section 3(c)(2) of the U.S. Housing Act of 1937 (42 U.S.C. 1437a(c)(2)), which defines the term "operation", as used in reference to public housing in the 1937 Act. Under the Act, HUD may pay operating subsidy for "operation" of a public housing project. In section 3(c)(2) of the 1937 Act, the term "operation" is defined to include financing of tenant services, particularly where the tenants participate in development and operation of the services. This means that HUD operating subsidy may to used to finance tenant services. However, the statute does not mandate tenant participation in project management, and does not require that public housing tenants must be given an opportunity to comment on decisions of PHA management, including development of a new lease form or PHA rules.

Comment claims that elimination of the tenant comment requirement is inconsistent with HUD's rule concerning tenant participation and management in public housing projects (51 FR 44055, December 8, 1986). However, that rule does not require tenant participation in management of public housing, or in the development of the tenant lease or PHA rules. Instead, the form and extent of tenant participation is a local decision, which is made by a PHA after consultation with its tenants (24 CFR 964.9). The PHA must consult with the tenants, to ascertain if the tenants want to participate in project management, and to determine mutually-agreeable methods of tenant participation. In the consultation, the tenants may propose tenant participation in the development of the lease form or PHA rules, which might include the opportunity for tenant comment on a proposed lease or proposed rule. However, under the lease and grievance rule or the tenant participation rule, the nature and form of consultation between the tenants and the PHA is for local determination by the PHA.

Finally, comment suggests that tenants have a due process right to comment on a proposed lease form or PHA rules. It is true that the tenant has a practical interest in the terms of a PHA lease form or PHA rules. The lease and PHA rules affect administration of the project in which the tenant lives, and also establish rights and duties of the tenant. In the case of the lease, the tenant is bound by terms of the PHA lease form when the tenant executes a lease on that form. The tenant is bound by PHA rules when the rules are adopted by the PHA. Once the lease and rules are in place, the lease and rules establish rights and duties of the tenant, and those rights or duties may define property interests which are protected by the Constitution. However, the tenant does not have a property right, and consequently does not have a due process protected interest, to participate in the original shaping of the lease or rule by the PHA. There is no property right to comment on the making of a PHA rule, or on development of the form of lease that will be offered for execution by the tenant.

Q. Changes in Rent or PHA Rules

1. Changes During Lease Term

During the course of the lease term, a PHA has authority to make important changes which affect the tenant, by adopting new PHA rules, and also by revising the tenants rent or utility allowances. For clarity and ease of reference, provisions governing such PHA changes during the lease term are gathered in a new § 966.10(n):

(1) From time to time during the course of the lease, the PHA may revise the amount of Tenant Rent or of PHA allowances to the Tenant for PHA-furnished or Tenant-purchased utilities. The revised amounts are binding on the Tenant.

(2) From time to time during the course of the lease, the PHA may revise PHA rules. The revised rules are binding on the Tenant.

2. Rent Increase

PHA comment states that the tenant should not be allowed to delay rent increases by delaying acceptance of a new lease. However, prompt implementation of a rent increase does not require offer and acceptance of a new lease or lease amendment. The lease provides that the amount of tenant rent is determined by the PHA in accordance with HUD regulations and requirements. The PHA may change the amount of rent previously determined by the PHA (§ 966.10(c) and § 966.10(n)(l)). The final rule also provides that the PHA may revise the amount of PHA allowances to the tenant (for PHA-furnished or tenant-purchased utilities) (§ 966.10(d)(5) and § 966.10(n)(1)). A rent change as determined by the PHA after annual or interim reexamination is not an amendment of the lease, but is a change in the rent amount in accordance with the terms of the existing lease. Rent changes are made by notice to the tenant, and do not require any change in the terms of the lease. Upon PHA notice of the new amounts, the revised amounts are binding on the tenant.

Although not required by this rule, the lease may state the current rent amount (and not merely the requirement for rent computation in accordance with HUD requirements). Inclusion of the actual amount may be required by State law, or may assist in enforcement of rent payment requirements in the local landlord-tenant courts. If desired by the PHA, the lease may provide that the amount of rent stated in the lease may be revised by a PHA notice to tenant (which states the new rent amount), and that such notice constitutes an amendment of the lease.

3. PHA Rules

The proposed rule provides that the PHA rules must be available for inspection by a family, but does not require the use of any particular procedure (posting or otherwise) for this purpose. Public comment states that the PHA should be required to post the rules, or furnish the rules to the tenant. A tenant must have notice of PHA rules so that the tenant can comply. The tenant should be given a copy of the rules. Unless PHA rules are furnished to the tenant, the rules may be unenforceable. However, other comment states that posting of rules is not necessary.

The final rule provides that the tenant must comply with "necessary and reasonable PHA rules, on conduct of Household members, or on use and treatment of the unit and premises by the Tenant and Household" (§ 966.10(h)(2)(iv)). The final rule requires the PHA to give the tenant a copy of these PHA rules—including any changes in the rules. The purpose of this requirement is to give the tenant fair notice of the rules with which the tenant must comply.

R. Offer of Lease or Revision

1. Offer and Acceptance

A public housing tenancy continues indefinitely until terminated for cause. During the term of an ongoing lease, the PHA may need to revise the lease terms, or to enter a new lease with the tenant. For example, the PHA may want to incorporate new lease provisions because of a change in State statutes, or because of new court decisions.

The lease is a contract between the tenant and the PHA. The lease may only be revised by the tenant's agreement to be bound by new lease provisions. The rule (§ 966.10(o)2)) states that "the Tenant is not bound by a new lease or lease revision unless the PHA's offer is accepted by the Tenant". Thus a revision of the lease is not accomplished by unilaterial act of the PHA, or without assent of the tenant. By contrast, the PHA has unilateral authority to revise PHA rules or the tenant rent, and these revisions do not require assent of the tenant (see § 966.10(n) of the rule, and section III.Q of this Preamble).

Comment states that in California a landlord may give notice of new lease terms. If the tenant remains in possession for 30 days, the tenant is deemed to have accepted the new terms offered by the owner. Under the HUD rule, a new lease is not binding unless accepted by the tenant. Moreover, the rule provides that the PHA's offer of a new lease or lease revision must state how to accept the PHA offer (§ 966.10(o)(3)). However, the HUD rule does not seek to define what constitutes an offer and acceptance, thus forming a binding contract between the PHA and the tenant. The HUD rule leaves this question to the general law of offer and acceptance, as determined by State statute or common law.

Comment states that tenant acceptance of a new lease should be assumed. The tenant should have the burden of refusing the offer. This recommendation is not adopted. HUD acknowledges that the content of the lease is not ordinarily determined by individual negotiation between the tenant and the PHA, and that a tenant may sign the lease without much understanding of what the document means. HUD acknowledges also that the procedure proposed by this comment may be convenient for both the PHA and the tenant, and avoids the risk that the tenancy may be terminated for tenant's failure to accept the PHA offer by the PHA deadline. However, the public housing lease is an important contractual undertaking by the tenant, and should be the product of a positive act of acceptance in accordance with State law and the PHA offer, not simply the product of tenant's failure to submit a formal refusal of the offer of a new lease.

Comment advises that the requirement for a tenant to execute a new lease in accordance with this rule should not apply to modifications of the lease provisions which were previously required by HUD under the old rule. However, the Department does not have the power to unilaterally bind the tenant contractually to new or different lease provisions. To change a lease executed under the old rule, the tenant has to agree to the new lease terms. (HUD has, however, power to establish new regulatory or other requirements, e.g., respecting tenant rent, which affect the tenant's occupancy under an existing lease.)

2. Timely Acceptance

The final rule states (§ 966.10(o)(3)):

> The offer of a new lease or lease revision shall state that failure to timely accept the PHA's offer is grounds for termination of tenancy. The offer shall state how to accept the offer. The offer may state that the Tenant must accept the lease by a PHA-established deadline which is stated in the offer. Failure to timely accept the PHA offer shall be "other good cause" for termination of tenancy.

The rule provides that tenant's failure to "timely accept" the PHA offer of a new lease or revision is grounds for termination. Comment states that the rule should specify what period is "timely", and states that the period for tenant acceptance should be short (five working days or two weeks).

The final rule does not set a uniform period for acceptance of the PHA lease. HUD agrees, however, that the PHA should be able to fix a definite deadline for the tenant to accept the new lease. For orderly and uniform administration of the transition to a new lease form, and for prompt implementation of the new lease provisions, the PHA should be able to set a date certain for return of the executed lease. The PHA needs to know when the deadline has expired, and the PHA may proceed to terminate the tenancy for failure to accept the new lease. The imposition of a clear deadline will also help the PHA push for prompt return of the executed lease by a tenant.

The final rule is revised to state that the PHA has the right to establish a deadline for the tenant to accept the offer of a new lease (§ 966.10(o)(3)). The tenant does not have a right to postpone lease acceptance beyond the PHA established deadline. Late acceptance of the lease by a tenant does not remove the grounds for termination of tenancy.

Comment states that if failure to accept a new lease is good cause for termination of tenancy, this should be stated in the PHA's written offer. HUD agrees. The tenant should know what will happen if the tenant does not return the executed lease in time. Clear notice to the tenant will also tend to help produce the desired result—prompt return of the executed lease by the tenant. The final rule provides that the PHA's offer must state that failure of timely acceptance is grounds for termination of tenancy (§ 966.10(o)(3)).

3. Failure to Accept is Grounds for Termination of Tenancy

As leverage to induce a public housing tenant to accept lease changes proffered by PHA, the PHA must have the right to terminate the tenancy if the tenant declines to accept the offered changes. The old rule does not explicitly state that the PHA may offer a new lease to the tenant, and that failure to sign a new lease is good cause for termination of tenancy. The new rule provides that the PHA may offer the tenant a new lease or revision of the lease (§ 966.10(o)(1)), and that failure to timely accept the PHA offer shall be "other good cause" for termination of tenancy (§ 966.10(o)(3)).

PHA comment strongly supports clarification that non-acceptance of the PHA offer of a new lease is ground for termination of tenancy. Many tenants do not sign new leases. The failure to sign a new lease is an administrative burden for the PHA.

Comment criticizes the provision that the tenant's failure to return the new lease in time "shall" be good cause for eviction. Comment claims that in some situations failure to return the new lease is excusable. The rule should recognize that failure to return the lease "may" be ground for termination. The PHA should have flexibility to decide whether the tenant will be evicted.

Such comment is based on a misunderstanding of the new provision. If the tenant does not accept the lease offered by the PHA, the PHA has legal grounds to evict. However, a PHA does not have to terminate tenancy in every instance where there is legal good cause for termination. The determination to terminate tenancy and evict the tenant is not automatic. The PHA has managerial discretion to consider special circumstances of the individual case, and to decide whether to evict the tenant. In practice, most PHAs will be loath to evict for minor or excusable delay in accepting the PHA offer of a lease. The authority for termination of tenancy where the tenant fails to accept the PHA offer of a new lease or revision will probably be chiefly used as a stimulus for prompt return of executed leases.

4. When Offered

The proposed rule provides that the PHA must give written notice of the offer of a new lease or revision at least *thirty* days before the proposed date when the new provisions will be effective. Under the final rule, there is no requirement for specific minimum notice before the proposed effective date. (But see section III.T of Preamble, concerning required notice at the end of a fixed term lease.) Since the new lease does not go into effect without acceptance by the tenant, a specified minimum notice is not necessary. The PHA can work out the mechanics of scheduling offer and acceptance of a new lease before a desired effective date.

S. Term of Lease—Fixed Term or Periodic Tenancy

Comment states that the new rule requires the PHA to lease the unit for a fixed term, rather than for a lease term which continues indefinitely until terminated for cause. Comment states that the rule should retain leases that renew automatically each month until terminated for cause. The use of fixed term leases causes unnecessary paperwork and administrative burden in order to renew the lease at the end of the fixed term.

In reality, the proposed rule did not require or encourage the use of fixed term leases. Under the new rule, as under the old, the PHA has a choice whether to enter a lease for a periodic tenancy (month-to-month or other interval chosen by the PHA), or for a fixed term. Both options are equally available to the PHA under the old rule or the new. HUD did not propose any change in this system, and no such change is included in this final rule. Under either form of lease, the public housing tenancy continues indefinitely until terminated for cause (see U.S. Housing Act of 1937, section 6(l)(4), 42 U.S.C. 1437d(l)(4); § 966.21).

The old rule provides that a PHA may not "terminate or *refuse to renew* the lease" other than for cause. Thus, if a PHA chooses to use a fixed term lease, the PHA is required to renew the lease unless there is good cause for termination of tenancy. Similarly, under the new rule the PHA may not terminate the tenancy except for good cause grounds (§ 966.21). The phrase "termination of tenancy" is defined (§ 966.2) as termination of the tenant's "legal right to occupancy of the dwelling unit", including "a decision not to renew the lease at the end of the lease term".

Comment notes that HUD has eliminated authority for use of fixed lease terms in the section 8 certificate program (as well as the section 8 voucher program) because of the problems of fixed term leases. In substance, the comment asks why the same logic does not support elimination of fixed term leases in public housing. It is true that in public housing, as in the certificate program, the assisted tenancy continues indefinitely unless terminated for cause. There is, however, a central structural distinction between the programs. In the section 8 program, the flow of housing assistance payments to the owner can only continue so long as there is a lease. Where there is a fixed term lease, the section 8 assistance payments immediately terminate at the end of the fixed lease term if a new lease (and assistance contract) is not entered (see Preamble section VIII.A in 49 FR 12215, 12231–12232, March 29, 1984). In public housing, there is no parallel problem of assuring that the flow of Federal subsidy, and consequently assisted occupancy by the tenant, is not interrupted on termination of a fixed term lease. In the public housing program, the PHA is the owner of the dwelling unit. If the PHA has not entered a new lease, the tenant may continue to live in the unit unless the tenancy is terminated for cause. There is no interruption of subsidy or of the assisted occupancy. The PHA may only evict the tenant on a showing of good cause.

HUD has not surveyed the extent to which PHAs use fixed term leases or periodic leases. It is HUD's impression that most PHAs do not use fixed term leases, but use leases that renew periodically unless terminated for cause. As stated in public comment on this rule, use of periodic leases reduces the administrative burden of the PHA, since the existing leases extend automatically until there is a particular reason for changing the lease. As under the old rule, the choice whether to use a fixed term or a periodic lease is best left to the PHA, since the PHA can weigh the additional administrative burdens of a fixed term lease, and any other factors supporting use of either form of tenancy. In making the decision, the PHA may be influenced by procedural or substantive incidents of the tenancy under State law.

Because comment exhibits considerable confusion on the type of tenancy which is allowed by the new rule, the final rule adds a new provision to clarify that the PHA has the choice of a fixed term or periodic tenancy. The rule now provides (§ 966.10(b)(2)):

> The term of the lease may be for a fixed term tenancy or for a periodic tenancy (e.g., month-to-month). In either case, the PHA shall not terminate the tenancy except in accordance with [HUD requirements].

The PHA may only evict the family on a showing of good cause.

T. Fixed Term Lease—Notice at End of Lease term

A PHA may use a fixed term lease or a periodic lease. In the case of a fixed term lease, the lease does not extend automatically. At the end of the stated lease term, the lease ends unless the PHA and tenant enter into a new lease.

The final rule adds a new provision which requires notice to the tenant before the end of a fixed term lease (§ 966.10(o)(4)). At the end of a fixed term lease, the tenant loses the tenure and occupancy protections provided by the lease. The end of a fixed term lease is a major change in the legal occupancy rights of the former tenant. For this reason, the concept of termination of tenancy is specifically defined to include "a decision not to renew the lease at the end of the lease term" (§ 966.2). The PHA must have good cause grounds for termination of tenancy (serious or repeated lease violation or other good cause) (§ 996.21).

For protection of the tenant at the end of a fixed term lease, the rule provides that at least sixty days before the end of the fixed lease term, the PHA must either offer the tenant a lease renewal (on the same or revised terms), or must notify the tenant that the PHA has decided not to renew the lease (including a statement of the good cause grounds for not renewing the lease).

The rule (§ 966.10(o)(4)) provides that:

> at least 60 days before the end of the [fixed] lease term, the PHA shall give written notice to the tenant containing either:
>
> (i) the offer of renewal (on the same or revised terms), or
>
> (ii) notice that the PHA has decided not to renew the lease, including a statement of the [good cause] grounds * * * for not renewing the lease.

As the end of the fixed term approaches, the tenant needs to know if the PHA intends to renew the lease, or intends to refuse a renewal on appropriate good cause grounds. Statutory and regulatory requirements for notice of lease termination do not apply, since the natural end of the fixed lease term is not a termination of the lease. The sixty day notice required by this rule informs the tenant whether the PHA intends to renew the lease at the end of the fixed term, or to terminate the tenancy for cause. If the PHA has decided to terminate the tenancy, the tenant can prepare to leave the unit, or to contest the grounds for termination.

The sixty day notice requirement only applies at the end of a fixed term lease, but does not apply to a periodic tenancy—which renews automatically unless terminated for cause (such as a periodic tenancy from month-to-month or year to year). In the case of a periodic tenancy, the leasehold will continue indefinitely unless the PHA gives notice of lease termination (see § 966.22), or gives notice that the PHA is offering a new lease or revision (see § 966.10(o)). By contrast, a fixed term lease expires automatically at the end of the predetermined fixed term, and the rule requires sixty day notice so that the tenant will know what will happen at the end of the fixed term, and can take appropriate action.

Comment recommends that the PHA be required to state good cause grounds for refusal to renew a fixed term lease at the end of the lease term. This recommendation is adopted.

U. Transition—Applicability of New Lease Requirements

The rule provides that the new regulatory lease requirements are applicable to any lease which is executed by a tenant after the effective date of the rule, including the execution of a revision or extension after that date (§ 966.12). The new lease requirements do not automatically apply to preexisting leases, but become applicable by the positive contractual action of the tenant in executing a new lease, a lease revision, or a lease extension offered by the PHA.

New lease requirements apply to all leases executed after the rule is effective. However, there is no requirement to terminate existing leases wholesale, or to execute new leases by a HUD-imposed regulatory deadline. The PHA is permitted to phase in the use of the new regulatory lease requirements by determining when tenants execute new lease documents. The PHA may schedule execution of leases and lease revisions in accordance with prior PHA practice, or other PHA policy on conversion to use of new leases. Under the new rule, the PHA will have considerable freedom in working out timing of a process to convert existing leases to new leases developed under the new rule. The PHA is free to pick an appropriate period or point in time for execution of new leases, and thus for conversion of existing leases to requirements of the new rule.

PHA comment expresses a preference for conversion at the next reexamination of a tenant, to avoid the administrative burden of operating for a period under different lease forms. HUD agrees that the regular annual reexamination may be a convenient conversion point. The offer of a new lease may be handled at the same time as other communications with tenant in connection with the reexamination. If tenant reexamination dates are staggered through the PHA fiscal year (to even out the workload of processing reexaminations), the use of the annual reexamination as the point of conversion would have the effect of staggering the lease conversion through the PHA fiscal year. During this period, the PHA will have some tenants on the old lease form, and some on the new. Alternatively, the PHA may choose to set a single date for conversion of the whole PHA program, to diminish the period of overlap between use of old and new lease forms.

The speed and form of the conversion process is affected by the terms of existing leases, as well as by procedural and substantive requirements under State law. The conversion process must be consistent with contractual rights of tenants under existing leases. Many PHAs use month-to-month periodic leases, which extend automatically until the leases are terminated for cause. It appears that in general a lease may be readily and rapidly converted by offering a new lease, and giving thirty day notice that the old lease is terminated in order to permit conversion to the new lease.

Legal aid comment states that PHAs should be allowed to retain current leases developed for use under the old rule. HUD notes that the new rule does not grandfather lease forms developed under the old rule. All new leases must comply with the new rule. However, few changes will be necessary. Most regulatory changes from the old lease rule remove or relieve lease requirements which are too detailed, or which overly constrain the managerial discretion of the PHA. Therefore, most provisions which satisfied the requirements of the old rule will also satisfy requirements of the new rule. The PHA may elect to continue use of the old lease form, after making those few modifications necessary to comply with the new rule.

The old rule provided that the PHA grievance procedure must be incorporated in the PHA dwelling lease (old rule § 966.50). Therefore changes in the scope and shape of the old PHA grievance procedure pursuant to this rule (see Part V and Part VI of this Preamble) should be accompanied by corresponding revisions in the grievance requirements incorporated in the PHA dwelling lease form, or by removing the grievance procedure from the lease form. The new rule does not require incorporation of the PHA grievance procedure in the tenant lease.

Because the grievance procedure was incorporated in the old lease, the PHA may have to revise existing leases in order to implement changes in the grievance procedure. Under the old lease, the tenant has a contractual right to use the grievance procedure stated in the lease. These contractual rights of the tenant under the existing lease may therefore prevent the PHA from making changes in the grievance process with respect to the tenant (for example, excluding termination of tenancy and eviction from the PHA grievance procedure). The right of an existing tenant to use the old grievance procedure under an existing lease depends on the particular contractual language by which the grievance procedure was incorporated in the lease. For example, a simple incorporation by reference which binds the PHA to use the current PHA grievance procedure does not freeze the grievance procedure in effect at the time of lease execution, but will accommodate the grievance procedure changes which are authorized under this rule. In any event, execution of a new lease will wipe out any rights to use of the old grievance procedure as incorporated in the old lease.

V. Turnkey III and Indian Housing—Lease Requirements

1. Turnkey III and Mutual Help

In the Turnkey III and Mutual Help homeownership opportunity programs, PHAs are required to use the forms of homeownership agreement prescribed by HUD. In each program the agreement with the homebuyer is a long-term lease with option to purchase (for a term of 25 or 30 years). The form agreement does not contain any of the unreasonable provisions prohibited for the HUD housing subsidy programs, or any other provisions deemed unreasonable by the Department. Thus, no new regulatory action is necessary for compliance with the prohibition of unreasonable lease provisions in the 1983 law.

Under the 1983 law, a PHA must give adequate written notice of lease termination, for a minimum period specified in the law (42 U.S.C. 1437d(l)(3)). HUD-prescribed form homeownership agreements require adequate 30 day notice if a homeownership agreement is terminated by the PHA for breach of the agreement by the homebuyer (Turnkey III and Mutual Help), or for loss of homeownership potential (Turnkey III) (see § 904.107(m) and (o), and 905.424(b) of the present rules). These existing notice procedures satisfy the statutory requirements for notice of lease termination under the 1983 law.

The Turnkey III and Mutual Help agreements also provide that the PHA may terminate an agreement if there is no qualified successor (on death, mental incapacity or abandonment by the homebuyer) (§ 904.107(l)(3) and 905.425(g)). However, the existing regulations do not explicitly require notice of termination on this ground. The regulations are therefore amended to require adequate written notice of termination in compliance with the 1983 law. For consistency with the other termination provisions in the Turnkey III and Mutual Help regulations, the rule requires 30 days notice of termination if there is no qualified successor to the homebuyer.

The Turnkey III and Mutual Help regulations and forms of homeownership agreement provide (§ 904.107(m)(l) and 905.424(a)) that the PHA may terminate the homebuyer agreement if the homebuyer violates the agreement. To accord with the statutory standard for termination of tenancy under the 1983 law (U.S. Housing Act of 1937, section 6(l)(4), 42 U.S.C. 1437d(l)(4)), this rule amends the regulations for these homeownership programs to specify that the homeownership agreement may be terminated for *"serious or repeated* violation" of the agreement.

The Turnkey III and Mutual Help homebuyer agreements may also be terminated if there is no qualified successor (§ 904.107(1)(3) and 905.425(g)), or (in Turnkey III) if the homebuyer has lost homeownership potential (§ 904.107(o)). Both of these grounds for termination are comprised in the concept of "other good cause" for termination of tenancy, and no amendment is necessary for compliance with the standards for termination of tenancy in the 1983 law.

2. Indian Rental Projects

Historically, Indian housing rental projects have not been covered by regulatory lease requirements for non-Indian rental projects (Part 966), nor are such requirements contained in the Indian Housing regulation (see Part 905, Subpart C). The new statutory lease requirements must be implemented for the Indian housing rental program.

This rule requires full compliance with the statutory lease requirements enacted in 1983 (42 U.S.C. 1437d(l)), but does not require use of the more elaborate set of regulatory lease requirements imposed by HUD under the 1983 law for non-Indian rental projects. The rule provides (§ 905.303) that a written lease shall be entered between the Indian Housing Authority (IHA) and the tenant of a rental unit.

The lease must:

—Obligate the IHA to maintain the project in a decent, safe and sanitary conditon.

—Require the IHA to give adequate written notice of termination of the lease in accordance with the requirements (§ 966.22) for non-Indian projects.

—Require that the IHA may not terminate the tenancy except for the statutory good cause grounds (§ 966.21).

The lease may not include any of the lease provisions prohibited by HUD (section 966.11).

IV. Termination of Tenancy

A. Grounds

1. Statute and Rule

Under section 6(l)(4) of the U.S. Housing Act of 1937 (42 U.S.C. 1437(l)(4)), the lease must require that the PHA may not terminate the tenancy "except for serious or repeated violation of the terms or conditions of the lease or for other good cause." This statement of the grounds for termination of tenancy was added in the 1983 law.

Under the rule (§ 966.21(a)), a housing lease must require that:

> "The PHA shall not terminate the tenancy, and shall not evict occupants from the dwelling unit, except for (1) serious or repeated violation of the lease, or (2) other good cause."

2. Other Good Cause

a. When PHA May Terminate for Other Good Cause. Comment recommends that the PHA should be required to give advance notice of family behavior which will *in the future* be good cause for termination of tenancy, as in the current regulations for some of the project-based HUD subsidy programs. The comment states that a tenant should not be threatened with eviction for grounds which are not foreseeable. The tenant should be given thirty days notice that specified future conduct and action will be "other good cause" for termination of tenancy.

This recommendation is not adopted. The PHA should be able to respond immediately to family behavior which justifies a termination of tenancy, and should not have to wait for a repetition of the behavior. Types of undesirable family behavior which are anticipated by the PHA are ordinarily prohibited in the lease or in PHA rules. The statutory category of "other good cause" is most usefully applied to permit a termination of tenancy for grounds not readily foreseeable by the PHA.

Comment states that there should be a more explicit regulatory definition of "other good cause", and that good cause should be explicitly defined in the lease. Comment complains that PHAs may use other good cause as a catch-all category that substantially negates good cause.

HUD believes that the concept of other good cause should be left broad and flexible, as authorized by the statute, for application by PHAs and the courts to a variety of facts and circumstances—including other good cause related to the behavior or characteristics of the family, and other good cause related to requirements for the PHA's management of the housing.

Comment says other good cause should be limited to material violations which affect livability of the property, or tenant health or safety. The suggestion is not adopted. The proposed change would unduly constrict the use of termination for other good cause.

b. Termination At End of Lease Term. In the private rental market, a landlord may terminate the lease *during the lease term* if the tenant violates the lease. At the end of the lease term, the landlord may generally refuse to renew for any reason or no reason (although this common law principle may be modified by state statute). In the public housing program, a tenancy continues indefinitely until terminated for cause. At the end of a lease term (including a periodic or a fixed term), the PHA must renew unless there is good cause for refusing to renew. The public housing tenancy is open-ended, and the PHA therefore needs a flexible authority to terminate the tenancy at the end of the lease term, for reasons which may not have been expected or included in the lease.

During the term of the lease, the PHA is bound by the lease with the tenant. Like any landlord, the PHA needs authority to evict a tenant who breaches a term of the lease. It is, however, less important that the PHA should have the broad authority to evict *during the lease term,* for grounds other than violation of the lease by the tenant. The final rule is therefore revised to provide that the PHA may only terminate the lease for other good cause "at the end of a lease term" (§ 966.21(c)(1)).

The rule also describes how this broad rule applies to a fixed term lease or to a lease for a periodic tenancy (§ 966.21(c)(2)):

> A fixed term lease may be terminated for other good cause at the end of the fixed term. A lease for a periodic tenancy may be terminated for other good cause at the end of each periodic term. For example, in the case of a month-to-month tenancy, the lease may be terminated for other good cause at the end of each month.

3. Violation of lease

a. Comment on Statutory Standard. Some comment asserts that the PHA should be permitted to terminate tenancy for any lease violation, not only for a "serious or repeated" violation as provided under the 1983 law. The standard for termination of tenancy will be subject to varying judicial interpretation, and will hinder ability of PHAs to evict. Comment suggests that while any lease violation should be grounds for eviction, the tenant should have a reasonable time (not more than 30 days) to correct the violation. Comment claims that the serious or repeated violation standard is useless and ambiguous.

Provision that a PHA may only terminate tenancy for serious or repeated violation of the lease (and thus may not terminate for a lease violation which is not serious or repeated) is necessary to comply with the 1983 law (U.S. Housing Act of 1937, section 6(l)(4), 42 U.S.C. 1437d(l)(4)). The rule must follow the statutory standard.

The concrete day-to-day operation of the statutory standard depends on how the standard is applied by State landlord-tenant courts in individual cases. Under this rule, the Federal statutory standards for termination of tenancy must be included in the public housing lease. Local landlord-tenant courts will apply the Federal standards for termination of tenancy (as terms of the public housing lease) to the facts of individual cases. A court has recently noted that claims under the termination of tenancy and other lease provisions required by the 1983 law "belong in local court" (*Edwards v. D.C.,* 821 F.2d 651, 653–54 n.2 (DC Cir. 1987)). It is the sense of the Department that the "serious or repeated" violation standard under the 1983 law is a reasonably workable basis for termination of tenancy in the public housing program.

b. What is a Serious or Repeated Violation? Comment states that HUD should further define or give examples of what is a "serious" or "repeated" violation of the lease.

Under the lease, the PHA may evict for a single "serious" violation of the lease, even if the violation is not repeated. The rule does not attempt a comprehensive definition of what types of violation are "serious". In general, application of this concept is best left to decisions by the State landlord-tenant court in individual cases.

However, the rule clarifies that the PHA may treat several specific types of lease violation by the tenant as a serious violation, and so as grounds for termination of tenancy:

(1) Failure to supply information or certification (§ 966.21(b)(1)) (see discussion at section III.H.2 of Preamble).

(2) Non-payment of rent or charges (§ 966.21(b)(2)) (see discussion at section III.G.5.b of Preamble).

(3) Utility shut-off when tenant fails to pay utility bill (§ 966.10(d)(4)(ii)) (see discussion at section III.G.5.e of Preamble).

The rule states that the concept of serious lease violation "includes, but is not limited to" the three mentioned cases (§ 966.21(b)).

Issues concerning termination of tenancy for non-payment of rent or charges, or for failure to provide income or other information, are of particular importance to PHA management of the program. The payment of rent, and the submission of required information on family information and composition, are necessary to implement statutory requirements, and for sound management of public housing projects. The rule provides that where the tenant fails to pay rent or charges, or fails to supply information required by the PHA, "the PHA may determine" that the failure is a "serious" violation of the lease (§ 966.21(b)). See discussion at section III.G.5.b (non-payment) and section III.H.2 (failure to provide information) of this Preamble. These provisions are a contractual affirmation that the determination to treat a lease violation as a serious violation warranting termination of tenancy is vested in the first instance in the administrative judgment of the PHA. The PHA has a contractual right to make the determination in accordance with the lease.

The final rule states that a utility shut-off because of tenant's failure to pay the utility bill is a serious lease violation. See discussion at section III.G.5.e of this Preamble.

The concept of "repeated" lease violation is usually easy to apply. Tenant's obligations are stated in the lease. Any lease violations may be grounds for termination if the violations are "repeated". It should be noted that the lease does not provide that the tenancy may only be terminated for repeated violation of the same provision of the lease, or for repetition of the same violation. Any set of repeated violations may be ground for termination of tenancy.

The old rule provides that the PHA may terminate the tenancy for serious or repeated violation of "material" terms of the lease. Comment criticizes elimination of the provision that the violation must be of a "material" term of the lease. Elimination broadens the base for eviction, and encourages the PHA to evict for minor infractions.

The final rule follows the statute, and does not include the limitation to violation of "material" terms. All terms of the lease are part of the contractual arrangement between the PHA and the tenant. Tenant's violation of any lease may result in termination of tenancy if the violation is either serious or repeated. The limitation to serious or repeated violation is a sufficient safeguard against eviction for trivial or minor reasons. The proposed restriction to "material" terms of the lease implies that there are non-material terms. The tenant should not be encouraged to believe that there are any lease requirements which may be safely ignored. The lease is a contract, and all provisions of the contract are binding. The retention of the old "material terms" limitation may encourage judges to reject eviction on subjective grounds, rather than to enforce the plain and literal requirements of the lease.

4. Grounds for Termination—Other Issues

a. PHA Discretion to Evict. Some comment states that the PHA should have discretion in deciding whether to evict the family. HUD agrees that the decision to evict is a discretionary management decision by the PHA. The statute and rule establish minimum grounds for termination of tenancy. The PHA is not required to terminate tenancy and evict in every case where there is ground for termination of tenancy.

b. Effect of Federal Rule on State Procedures. Comment states that the rule should require compliance with procedural protections for a tenant under State law, or should provide that State law controls where the Federal rule interferes with tenant protections under State law. Comment expresses concern that the rule deprives a public housing tenant of rights of a private tenant under State law. Other comment is concerned that the Federal rule may preempt State protections.

At a minimum, tenants are entitled to all the protections afforded by Federal law and this rule. State law may not override rights under Federal law or regulation, but may give a tenant the right to additional protections. Federal statute and regulation governing lease rights and termination of tenancy in the public housing program is not a comprehensive scheme that precludes other State regulation concerning this subject. To the contrary, it is assumed that the procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law.

State laws are binding without incorporation in a Federal rule, or in the Federally-required lease requirements. State tenant protections may be enforced through the State courts or other procedures available under State law, without any need to create a Federal right to State law protections.

B. Notice of Lease Termination

1. Notice Period

Section 6(l)(3) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(l)(3)), which was added by the 1983 law, provides that a public housing PHA must use leases that require "adequate written notice of termination of the lease" by the PHA. The law prescribes minimum notice periods:

> (A) a reasonable time, but not to exceed 30 days, when the health or safety of other tenants or public housing agency employees is threatened;
>
> (B) 14 days in the case of nonpayment of rent; and
>
> (C) 30 days in any other case * * *.

The statutory notice periods required by the 1983 law are essentially the same as under the old rule. The new rule requires a PHA to give notice of lease termination in accordance with the 1983 law (§ 966.22(a)).

The rule requires fourteen days notice in case of non-payment of rent. PHA comment states that HUD should not require written notice for non-payment of rent. Comment from a tenant organization says that ten days is ample. In answer to these comments, HUD notes that the requirement for notice of lease termination, and the fourteen day notice period for non-payment of rent, are statutory. The notice may not be eliminated or shortened.

The rule provides that if health or safety of tenants or employees is threatened, the notice period must be a "reasonable time" (§ 966.22(a)(1)). The statute and rule do not state any fixed minimum period for "reasonable" notice. However, the PHA is never required to give more than thirty days notice.

Comment recommends that the PHA should have to give notice for a minimum of ten days, but not more than thirty days. Comment requests further definition of "reasonable time", and states that a reasonable time should never exceed twenty-four hours.

HUD acknowledges that the application of the statutory "reasonable time" standard to particular cases may be a subject of dispute. The PHA has a legitimate need to know that the PHA's good faith judgment of what is a reasonable time as applied to a concrete set of facts will be sustained by the local landlord-tenant court. The PHA may be torn between the PHA's perception of urgency, and uncertainty whether the PHA's perception, and consequently the PHA's decision on what is a reasonable time, will be upheld by the local landlord-tenant court. If the court disagrees, the PHA may be forced to retrace procedural steps for eviction of the tenant, prolonging time needed to evict the tenant and prolonging also the danger to tenants or PHA employees.

HUD has no basis for defining a fixed reasonable time, where the notice period is less than thirty days. The determination of reasonableness should be based on the facts of individual cases. HUD also believes that the "reasonable time" standard is intended by the Congress to leave room for practical seat-of-the-pants judgments by PHA officials. HUD should not impose an arbitrary national standard.

However, the rule explicitly recognizes that the original judgment of what is a reasonable time can only be exercised by the PHA, which is responsible for day-to-day management of the program. The final rule provides that in health and safety cases notice of lease termination may not be less than "a reasonable time, *as determined by the PHA* * * *." (§ 966.22(a)(1)). In addition, the final rule states that "the PHA may establish a policy for determining what is a 'reasonable' time in different types of cases" *(Id.)*. The PHA is responsible for determining what is a "reasonable time".

2. Requirement for Adequate Notice

In accordance with section 6(l)(3) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(l)(3)), the rule provides that the PHA's notice of lease termination must give the tenant "adequate written notice" of a termination of the lease (§ 966.22(a)). The rule also prohibits use of a lease provision which would waive the statutory and regulatory requirement for adequate notice of lease termination (§ 966.11(d), see section III.L.3 of Preamble).

Comment states that the rule should specify that the PHA may only evict after complying with HUD requirements for a lease termination notice. HUD believes that further rule language is not necessary for this purpose. The rule provides that the PHA must give notice of lease termination to the tenant, and describes what is required for such notice. The lease, and therefore the tenant's right to occupancy under the lease, does not terminate unless the Federally required notice has been given. Consequently, the PHA may not evict until expiration of the required lease termination notice.

Comment states that the requirement for "adequate written notice" is too loose, and will result in inconsistent enforcement. However, the rule lists the principal elements which must be included in the lease termination notice § 966.22(b) on contents of termination notice), and also states the minimum notice periods required by the 1983 law. The rule will provide adequate instruction to the PHA.

The notice must "contain a specific statement of the reasons for lease termination" (§ 966.22(b)(3)). Comment states that the notice should provide enough information so that the tenant can prepare a defense, and that the notice should state the factual basis for the reasons, and the source of the facts.

A simple requirement to state the reasons for lease termination adequately conveys the need for an informative statement on the reasons why the PHA is terminating the lease. HUD will not burden the PHA with the need to draft elaborate pleadings setting forth factual and legal reasons for termination of the lease. The Federal notice of lease termination does not replace any pleadings or notices required in the State proceeding for eviction of the tenant. The State court eviction proceeding is subject to procedural requirements under State law, and to requirements for procedural due process under the fourteenth amendment that allows the tenant adequate notice and opportunity to present a defense.

Comment notes that the lease termination notice should state that the PHA can only evict the tenant for good cause. This recommendation is adopted.

Under the final rule the contents of the lease termination notice must:

- State that the PHA may only terminate the tenancy for serious or repeated violation of the lease, or other good cause" (§ 966.22(b)(2)).
- Contain a specific statement of the reasons for lease termination" (§ 966.22(b)(3)).
- State that the PHA may only evict occupants from the dwelling unit (i) through a civil court proceeding in which the Tenant has the opportunity to present a defense, and (ii) after a decision by the court on the rights of the parties" (§ 966.22(b)(4)).

3. When Lease Terminates

The October 1982 proposed rule (proposed § 866.13(b)(1)) provided that a notice of termination of tenancy must state the "date the tenancy shall terminate". A technical comment noted that under termination procedure in some States the actual date of lease termination is not or cannot be known at the time the PHA gives the HUD-required termination notice. This may occur, for example, because the date of lease termination depends on future events (such as actions by the local landlord tenant court after commencement of the eviction proceeding) whose dates are not known by the PHA at the time the PHA gives notice to the tenant. In response to this comment, the rule provides that the notice of lease termination must state "when" the lease will terminate (§ 966.22(b)(1)). If the date of lease termination is not known, the notice may state "the event by which the lease terminates under local procedures".

4. Relation to Notices Under State Law

The 1983 law does not describe the relationship between notice procedures under State and local law, and the notice of lease termination required by Federal law. The rule provides (§ 966.22(d)(1)) that:

> "A notice to vacate or other notice under State or local law may be combined with, or run concurrently with, the notice of lease termination * * * However, the lease shall in no event terminate before expiration of [the minimum lease terminatice notice periods under the Federal statute and this rule]."

Under the old lease and grievance rule, courts held that the PHA may only serve a State notice to quit after satisfaction of the lease termination notice required by the Federal rule. Under the 1983 law and the new rule, the Federal minimum notice period and any State notice periods may be run at the same time. The new rule provides that the State and Federal notices "may run concurrently". The rule also provides that although the Federal and State notices may be combined, the lease does not terminate before the end of the federally required notice of lease termination. As recommended by comment, the rule provides that the HUD mandated notice may actually be "combined with" any notice under State or local law.

Comment endorses the change to permit concurrent running of State and Federal notice. The added time for sequential running of the Federal and State notices, as required by the courts under the old rule, is not necessary for the tenant to prepare a defense or rectify violation. The PHA should file in State court immediately on completion of the HUD-required notice. Delay in commencement of State proceedings causes loss of PHA income, and increase in tenant abuse. The National Association of Housing and Redevelopment Officials (NAHRO) comments that the prior requirement for completion of fourteen days notice for nonpayment of the rent before the PHA could initiate State and local notice procedures created tremendous delays in removing residents. NAHRO states that the new rule provides PHAs much needed relief and control in carrying out eviction more expeditiously.

Comment claims that a provision for concurrent running of State and Federal notices is contrary to law. However, it is the view of the Department that the notice procedures under the rule comply literally and completely with applicable Federal statutory requirements, and with the requirements of procedural due process as enunciated by the Supreme Court. Unless HUD determines that State and local law require that a tenant have the opportunity for a fair hearing in court before eviction from the unit, no family may be evicted until the tenant has the opportunity for a PHA grievance hearing.

This rule seeks to avoid establishment of Federally imposed termination procedures which are not required by Federal law, and which will impede prompt processing of evictions by the PHA. Factors which lengthen the eviction process increase administrative burdens on the PHA, interfere with enforcement of contract requirements against the tenant, result in financial loss to the PHA (for example, by increasing the PHA collection loss), and are harmful to management of the project (for example by prolonging the period for eviction of a family which disturbs other residents or which damages the unit). HUD believes that the explicit authorization in this rule for concurrent running of State and Federal notices will contribute to efficient and effective management of public housing for the benefit of the residents.

Comment states that if State and Federal notices run concurrently, the PHA will not negotiate in good faith with the tenant. HUD believes that excessive built-in procedural delays in the eviction process undercut the incentive of the tenant to pay the rent and comply with other requirements of the lease. Thus the pyramiding of the Federal and State notice periods, pursuant to judicial construction of the old rule, probably tended to weaken the incentive of the tenant to negotiate in good faith for payment of back rent or correction of family behavior.

Comment says that allowing the PHA to combine the Federal and State notices will be confusing to the tenant. HUD is acutely aware that the existence of separate Federal and State notice procedures, as well as other separate Federal and State requirements for termination of tenancy, may result in some confusion. At the level of each individual PHA, the uniform national lease termination notice, which is required to implement the 1983 Federal law, interacts with different State procedures and requirements for termination of tenancy. For this reason, the Federal notice requirement will operate in different ways in different localities. Although the public housing lease termination notice is the same for all PHAs, the mean period for eviction of a public housing tenant will differ for different PHAs because of differences in local law and local courts.

In 1982 HUD proposed to eliminate Federally mandated minimum periods for termination of a public housing lease, thus eliminating confusion resulting from the overlay of Federal notice requirements on top of existing State notice procedures. Because of the 1983 law, elimination of the Federal notice periods is no longer an option. In this context, the rule is designed to permit the PHA to discover the best possible way to integrate Federal and State notice procedures. The rule therefore seeks to avoid unnecessary or over-elaborate Federal regulatory requirements that will complicate or unreasonably delay the eviction of a family.

Where Federal and State notices run concurrently, or are combined, the PHA must nevertheless comply with requirements of each regulatory scheme—and therefore the policies reflected in Federal and State notice requirements. Sequential stacking of Federal and State notices distorts the policy behind the separate notices, by forcing the PHA to give a longer notice than intended by either Federal or State law. For example, under the 1983 law and this rule, the PHA must give fourteen days notice for nonpayment of rent. This period reflects a legislative judgment that this period is adequate notice in non-payment cases.

Similarly, under the Uniform Residential Landlord and Tenant Act, the landlord may terminate a rental agreement after fourteen days written notice (Uniform Act, § 4.201). This period may be presumed to reflect a similar legislative judgment. If a PHA is forced to run the Federal and State termination notices consecutively (rather than concurrently), the tenant receives not fourteen days notice, as contemplated by each separate legislation, but twenty-eight days aggregate notice, double the period contemplated by State or Federal law. Conversely, the concurrent running of State and Federal notices permits full satisfaction of notice requirements under both State and Federal law.

Comment objects to requiring fourteen days notice before filing a State "warrant for non-payment". The rule does not instruct the PHA when to file or serve any document required by State law or procedure for eviction of a family. State process is wholly an artifact of State law, and may be issued at any time allowed by the State law. The rule does, however, remove any Federal impediment to filing or serving the State process at the earliest time allowed by the State law.

If State process may not be issued until the lease has been terminated, then the issuance of State process may be delayed by notice periods required by the Federal statute and this rule. For example, if State process for non-payment cannot be issued until the lease has terminated, the PHA must wait until the end of the fourteen day Federal notice period for non-payment of rent. Since the lease termination notice periods are statutory, HUD has no power to shorten or eliminate the required notice periods under the 1983 law.

5. Relation to PHA Rent Bill

A PHA suggests that to avoid delays in lease termination for non-payment of rent, the monthly rent statement should include a notice that the lease will terminate on a stated day if rent is not paid in accordance with the lease. This procedure would satisfy the lease termination notice requirement, as well as the PHA problems in collection of rent.

The PHA recommendation is adopted. The regulation provisions concerning notice of lease termination are amended to add new provisions which allow the PHA to give notice with the regular monthly rent bill that the lease will be terminated if tenant does not pay the rent bill on time. The revised rule provides (§ 966.22(d)(2)):

> The PHA rent bill may be combined with a notice of lease termination for nonpayment of rent. The notice of lease termination shall state that the lease will terminate if the rent bill is not paid when due.

The notice must be in accordance with all requirements for a notice of lease termination (§ 966.22), including the requirement for fourteen days notice of termination for nonpayment of rent (§ 966.22(a)(2)), and requirements concerning contents of a lease termination notice (§ 966.22(b)). The lease termination notice must be served in accordance with the requirements for service of a lease termination notice (§ 966.10(l)(2)(ii)). If the termination of tenancy is not excluded from the PHA grievance process, the PHA must also give notice of adverse action (in accordance with § 966.31(b)(2)(i)(B)). If the PHA elects to give notice of lease termination together with the monthly rent bill, the period of the 14 day lease termination notice runs from the date the notice is given.

6. Relation to Notice of Proposed Adverse Action

A proposed decision to terminate the tenancy is an adverse action by the PHA (§ 966.31(a)(2)(i)). Lease termination is included in the regulatory definition of termination of tenancy (§ 966.2). Upon timely request, a tenant has the statutory right to a grievance hearing on a proposed lease termination (U.S. Housing Act of 1937, section 6(k)(2), 42 U.S.C. 1437(k)(2)) (unless the PHA has elected to exclude the grievance from the administrative grievance procedure; see section VI of this Preamble).

The PHA must notify the tenant of the opportunity for a hearing on the proposed lease termination, by giving notice of proposed adverse action before or combined with the statutory notice of lease termination (§ 966.22(d)(3) and § 966.31(b)(2)(i)(B)). The tenant must be given the opportunity for a hearing before expiration of the applicable lease termination notice period. If the tenant makes a timely request for a hearing, the lease does not terminate, and the occupants may not be evicted from the unit before completion of the PHA grievance hearing (§ 966.31(e)(1)).

A comment generally agrees with these requirements, but is concerned that the tenant may be able to delay eviction by delaying the grievance hearing. HUD agrees that there is some potential for deliberate tenant-caused delay, and that such delay could hold up eviction. However, the PHA grievance procedure should be designed for prompt scheduling and completion of hearings (see § 966.32(f)). The PHA can structure the hearing process to minimize or avoid unnecessary tenant-caused delay.

The PHA grievance procedure may establish deadlines for submission of tenant grievance requests (§ 966.31(c)(2)). The grievance officer has authority to regulate conduct of the hearing, including the power to proceed promptly with the hearing (§ 966.32(c)). The hearing officer has ample authority to control or sanction dilatory tactics by the tenant (or tenant's attorney), or by the PHA. Both the PHA and the tenant have a legitimate interest in expeditious handling of grievances. Where a grievance hearing is required under the statute and this rule, the tenant must be given the "opportunity" for a grievance hearing. However, the fair opportunity for a hearing does not entail acquiescence to deliberate or unreasonable delay by either party.

C. Eviction by Judicial Process

1. Prohibition of "Self-Help" Eviction

The rule provides that the PHA may only evict the unit occupants through a "civil court proceeding" (§ 966.23(a)). In State court, the PHA must show that there is ground for eviction, and the tenant may present a defense. To safeguard the tenant's opportunity for a judicial hearing before eviction, the rule prohibits the PHA from requiring tenant to agree to lease provisions which would sign away in advance the tenant's right to a judicial hearing (§ 966.11(e); see also prohibited lease provisions *passim* (§ 966.11)). To give the tenant notice of the opportunity for judicial hearing before eviction, a notice of lease termination must advise the tenant that the PHA may only evict the occupants through a civil court proceeding in which the tenant has the opportunity to present a defense (§ 966.22(b)(4)).

The requirement for eviction through court process is intended to bar the use of "self-help" evictions, in which the landlord evicts the tenant before a court has decided that there is ground for termination of tenancy. The rule precludes the use by a PHA of non-judicial process for eviction of a tenant, even if self-help evictions are permitted under State law.

Legal aid comment states that the rule should prohibit use of any self-help remedies, and should prohibit any waiver of the tenant's right to exclusive use of judicial process for eviction. Comment asserts that some States allow self-help eviction tactics, such as lockout or utility shut-off, which effectively deprive tenants of possession without judicial hearing, and that under the law in at least one State landlords may recover possession of the premises under criminal procedure, which includes a requirement for the tenant to post bond, and authorization for jail or criminal fines.

Under the rule, the occupants may not be evicted unless the tenant has the opportunity for a judicial hearing on the tenant's defenses to eviction, and there is a judicial decision that the PHA has good cause for termination of tenancy (serious or repeated violation of the lease or other good cause). The rule does not seek to enumerate and proscribe PHA practices which impermissibly interfere with the tenant's possession and enjoyment of the unit before a judicial decision on the termination of tenancy. The requirement for eviction through judicial action is amply stated in the rule. Actions by a PHA which amount to a dispossession without judicial action, e.g., a lockout, are covered by the regulations.

Evidently, there is a whole spectrum of possible actions by a PHA respecting the tenant's continuing occupancy. The question of whether PHA actions so interfere with the tenant's possession as to compromise the tenant's right to a judicial determination before deprivation of full enjoyment and possession of the unit is best applied by individual courts in individual cases (or in the PHA administrative grievance procedure where the PHA has not opted to exclude a grievance on an eviction or termination of tenancy), rather than by imposing additional Federal regulatory restrictions. Until a judicial determination on the tenant's right of occupancy under the lease, the tenant possesses all of the rights stated in the lease, embracing the right to the services, maintenance and utilities specified in the lease, and the right to use and occupancy of the unit in accordance with the lease.

Comment objects to the prohibition of self-help eviction, and to the requirement for eviction through court process. The recommendation to delete these provisions is not accepted. Occupancy rights of assisted families should not be abridged or denied without the opportunity for a fair hearing in court.

Comment asks authority to evict without a court hearing if the tenant violates a court-approved settlement. This recommendation is not adopted. In all cases, the tenant should have the opportunity for a court hearing prior to eviction from the unit.

In the rule, the term "eviction" is defined as "forcing the occupants to move out of the dwelling unit" (§ 966.2). A separate provision, utilizing the defined concept of eviction, prohibits the PHA from evicting the tenant other than through a court proceeding (§ 966.23(a)). Comment states that "eviction" should be defined as forcing the tenant out through "court action". The change is not adopted. It is most precise to define the concept of a forced dispossession (in the definition of "eviction"), and to state separately the prohibition of a dispossession (eviction) other than through court action.

2. Prohibition of Criminal Process for Eviction

The rule provides (§ 966.23(a)):

> The PHA may only evict occupants from the dwelling unit: (1) Through a civil court proceeding in which the Tenant has the opportunity to present a defense, and (2) after a decision by the court on the rights of the parties.

The PHA may only evict by using a "civil court proceeding". The rule does not allow the use of criminal process for eviction of the tenant. There are several reasons for this prohibition:

—The State's designation of particular court process as a "criminal" proceeding indicates that the process is designed and intended by the State for punishment and deterrence of crime. The prime function of the eviction remedy in public housing should not be to punish or deter criminal action, but to restore the unit to the PHA for rental to another tenant.

—Remedies in a criminal process are more drastic than in a civil proceeding, and are not proportioned to the simple correction of the injury caused by the defendant. Criminal penalties such as jailing and criminal fines are not necessary or appropriate remedies for removal of a public housing tenant who violates the lease.

—Criminal process is designed to determine if the defendant has violated a criminal statute. In eviction of a public housing family, the central question should be whether the tenant has violated the lease, or there is other good cause for termination of tenancy.

—Use of criminal process for eviction may tag the tenant or family members with the onus of criminal violation, or a criminal record. Behavior which justifies termination of tenancy (e.g., injury to other residents) may or may not be criminal in character. If criminal, the crime may be prosecuted. However, the immediate benefit of eviction for the PHA is not the prosecution of crime, but the possession of the unit. The function of regaining possession of the unit may be accomplished through a civil eviction process.

—HUD is not aware that any State lacks an adequate civil eviction process.

While some comment urges that PHAs should be allowed to use criminal procedures to gain possession of the unit in some circumstances, comment does not allege the absence of an effective civil eviction process in any jurisdiction.

Comment states that the PHA should be allowed to use criminal process to evict a tenant who damages PHA property or equipment, who is a serious threat to health or safety of other tenants or PHA employees, or who commits criminal offenses.

The Preamble to the proposed rule stated (51 FR 26514, July 23, 1986) that the prohibition of resort to criminal proceedings for eviction is not intended to regulate or interfere with the use of the criminal process by the PHA to remedy a breach of peace by members of the family, or resort to criminal process for ejectment of a family which is damaging the unit or project, or endangering other families or PHA personnel. Comments recommend that this interpretation of the prohibition should be added to the text of the regulation.

The final rule is revised to describe the intended relation between the prohibition on use of criminal process for eviction of the occupants, and the ordinary and continuing role of criminal process to remedy criminal behavior by individual members of the family. The final rule provides (§ 966.23(b)):

> The requirement for eviction through a civil court proceeding is binding on the PHA, but is not intended to limit arrest, prosecution or other criminal enforcement activities by Federal, State or local law enforcement authorities against members of the Household for any crime. The PHA and its officers, employees or agents may act as complainants or witnesses in any criminal enforcement activity, and may cooperate with law enforcement authorities in any criminal enforcement activity.

This new language is intended to clarify that the prohibition against PHA use of a criminal proceeding for eviction of the occupants does not in any way insulate the occupants from ordinary criminal process or prosecution for any criminal act. Criminal enforcement may result in arrest or confinement, and therefore the removal of a family member from the unit for the period of confinement. Criminal enforcement against individual family members does not, however, directly determine the contractual right of the tenant to continued occupancy of the unit for residence by the family under the lease.

Crime or conviction of a crime by a family member does not automatically terminate the right to occupancy of the unit. The contractual right to occupancy of the unit is determined by decision of the landlord-tenant court in a civil eviction proceeding brought by the PHA against the tenant. In the civil eviction proceeding, criminal activity or criminal conviction is ground for termination of the legal right of the tenant to occupy the unit. The PHA may evict after the court in the civil eviction action decides that the crime is good cause for the eviction.

V. Administrative Grievance Procedure

A. Legislation

Section 6(k) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(k); added in 1983 by section 204 of the 1983 law) provides:

> The Secretary shall by regulation require each public housing agency * * * to establish and implement an administrative grievance procedure under which tenants will—
>
> (1) be advised of the specific grounds of any proposed adverse public housing agency action;
>
> (2) have an opportunity for a hearing before an impartial party upon timely request within [the statutory period for a notice of lease termination];
>
> (3) have an opportunity to examine any documents or records or regulations related to the proposed action;
>
> (4) be entitled to be represented by another person of his choice at any hearing;
>
> (5) be entitled to ask questions of witnesses and have others make statements on his behalf; and
>
> (6) be entitled to receive a written decision by the public housing agency on the proposed action.
>
> An agency may exclude from its procedure any grievance concerning an eviction or termination of tenancy in any jurisdiction which requires that, prior to eviction, a tenant be given a hearing in court which the Secretary determines provide the basic elements of due process.

B. Subject of Grievance Hearing

1. New Rule

The old rule contained a sweeping requirement to give a grievance hearing on "any dispute" concerning PHA action or non-action affecting the individual tenant. In accordance with section 6(k) of the U.S. Housing Act of 1937, the final rule requires a PHA to establish an administrative grievance procedure for hearing on *any proposed PHA adverse action* affecting the individual tenant (§ 966.30(b)).

The final rule provides (§ 966.31(a)(2)) that proposed adverse action means any of the following proposed decisions by the PHA concerning an individual tenant:

> (i) A proposed decision to terminate the tenancy, or to evict occupants from the dwelling unit.
>
> (ii) A proposed decision to require the Tenant to move to another dwelling unit * * *.
>
> (iii) A proposed decision determining:
>
> (A) The amount of the Tenant Rent payable by the Tenant to the PHA or the amount of utility reimbursement by the PHA to the Tenant,
>
> (B) The amount of PHA charges in addition to Tenant Rent * * *, or
>
> (C) The amount the Tenant owes the PHA for Tenant Rent or PHA charges.
>
> (iv) A proposed decision to take over specific, concrete, and affirmative individualized action contrary to the interests of a Tenant.

2. Scope of Right To Grieve

a. Legislative History—Distinction Between PHA Action and PHA Failure to Act. The statutory grievance requirement under the 1983 law finally enacted by the Congress applies to "any proposed adverse public housing agency action" (Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98–181, November 30, 1983, section 204; section 6(k) of the U.S. Housing Act of 1937, 42 U.S.C. 1437d(k)). As originally reported by the House Banking Committee in May 1983, the House bill would have required PHAs to provide tenants the opportunity to be heard in accordance with grievance safeguards in the HUD lease and grievance rule in effect at that date, i.e., the old lease and grievance rule. Under the House Committee bill, the grievance requirement would have applied to "public housing agency actions *or failures to act* that adversely affect [tenant and applicant] *rights, duties, welfare or status*" (emphasis supplied) (Report 98–123 on H.R. 1, p. 175). The House Committee Report states that "the bill provides that the grievance procedures shall be available for *all disputes* between a PHA and * * * a tenant or former tenant" (emphasis supplied) (*Id.*, p. 35). The House Committee Report also states that the "Committee contemplates that HUD will meet this obligation [to require PHAs to maintain grievance procedures] *by retaining the present regulations*" (emphasis supplied) (*Id.*, p. 35).

The bill originally passed by the House of Representatives (H.R. 1, section 206, passed House on July 13, 1983) contains the same language on the statutory grievance requirement as the bill previously reported by the House Banking Committee. The language of the House bill would have required PHA administrative hearings in almost every case in which a tenant contests a PHA action or failure to act that affects a tenant's rights, duties, welfare or status. Thus the original House bill would have essentially codified the grievance requirement under the old HUD rule. This language was not, however, enacted by Congress.

The law finally enacted by the Congress in November 1983 deleted the broad grievance language in the original House bill (Pub. L. 98-181, see legislative history at 97 Stat. 1299). The 1983 law eliminated the proposed requirement, contained in the original House bill, to establish a grievance procedure subject to requirements of the old rule, to grieve on disputes pertaining to a PHA's "failures to act", or on "all disputes" concerning acts or failures to act that adversely affect tenant "rights, duties, welfare or status".

The Congress deleted the proposed requirement to grieve on PHA "failures to act", and added instead a requirement to grieve on a "proposed adverse action" (U.S. Housing Act of 1937, section 6(k), 42 U.S.C. 1437d(k)). The legislative history supports the conclusion that the statute only requires a PHA to give the tenant the opportunity to grieve on specific proposed PHA actions concerning the individual tenant, as opposed to PHA failure to act.

The legislative history also indicates that the grievance requirement in the 1983 law does not apply broadly to "all disputes" that adversely affect a tenant's rights, duties, welfare or status, as under the old rule. Unlike the old rule, the statutory grievance requirement does not broadly cover cases in which a tenant asserts the existence of a dispute or potential dispute with the PHA (see old rule § 966.51(a) and 966.53(a)). The grievance requirement applies to a case where the PHA is considering whether to take specific, concrete and affirmative individualized "action", and the action is "adverse", i.e., contrary to the interests of an individual tenant.

A decision by the United States Court of Appeals for the District of Columbia Circuit, in *Samuels v. D.C. et al.*, 770 F.2d 184 (DC Cir. 1985), has expressed a different conclusion on the reach of the statutory grievance requirement. The DC Court of Appeals says that Congress intended to preserve HUD's existing regulatory grievance structure, and that the statutory grievance requirement applies to all tenant disputes covered under the then-extant HUD regulation. The *Samuels* court rejects the position that the new statutory grievance requirement applies only to proposed affirmative future action against a tenant, and denies that there is a statutory distinction between action and failure to act.

HUD was not a party to this case. Therefore, the court had no opportunity to consider the interpretation of the statute by the agency which administers the statute. Many decisions affirm that the interpretation of the administering agency is entitled to deference by the courts. The Supreme Court recently remarked that "HUD's opinion as to available tenant remedies under the Housing Act is entitled to some deference by this Court" (*Wright v. Roanoke*, 479 U.S. —, —, 107 S. Ct. 766, 772 (1987)).

The decision by the *Samuels* court is based on a plain misunderstanding of the legislative history of the statutory grievance requirement. The court's reading of legislative intent is based on *the original House Bill*, not on the bill actually passed by the Congress. To support the court's view of the meaning of Section 6(k), the decision repeatedly cites the House Committee Report (and also cites a statement by a Congressman on the floor of the House). The court did not know, and was not informed by the parties, that the actual language of the law finally passed by the Congress differs radically from the language originally approved by the House and the House Committee. (The briefs and record on appeal in *Samuels* do not contain any mention or explanation of the difference between the House bill and the final statute.) Indeed, the changes from the bill proposed by the House demonstrate that Congress rejected the broad grievance requirement originally proposed by the House. The changes show that Congress did not intend to codify the broad existing regulatory grievance requirement for disputes between the PHA and a tenant, and that the statutory grievance requirement only applies to an adverse *action* proposed by a PHA.

In accordance with the 1983 law passed by the Congress, the final rule (§ 966.31(a)) requires the PHA to provide the tenant the opportunity for a hearing on any proposed *adverse action*. The rule (§ 966.31(a)(2)) specifies what proposed PHA actions are adverse actions on which the tenant must be given the opportunity for a hearing.

Comment from the legal aid community vehemently protests the distinction between PHA action and non-action, asserting that the tenant should have a broad right to grieve on the PHA's failure to act. Comment objects to HUD's reading of the legislative history of the 1983 law, and objects that HUD does not acquiesce in the decision of the DC Court of Appeals in *Samuels*.

The House bill provided that the PHA must grieve on any PHA "actions *or failures to act*." The law finally passed by the Congress and signed by the President provides that tenants must have the right to grieve on any proposed "adverse public housing agency *action*." Legal aid comment states that HUD relies too much on this change in the wording of the statute, and that HUD should instead rely (as did the court in *Samuels*) on the Report of the House Banking Committee in reporting out the original language. *Comment states that* the PHA's *denial* of the tenant's request for action amounts to affirmative action.

Comment states that the 1983 law did not enact a new grievance requirement, but codified the language "always used" to define what is grievable under the old rule. This assertion is false. The old rule provided that a grievance is *"any dispute"* a tenant may choose to raise "with respect to PHA *action or failure to act"* concerning the individual tenant (§ 966.53(a) of the old rule). The law passed in 1983 only requires a grievance hearing on a proposed "adverse action". The language of the old rule is sharply different from the language of the 1983 law.

In substance, legal aid comment asks HUD to ignore the actual language and history of the 1983 law. The legal aid position does not square with the plain and literal language of the statute, which in terms requires a grievance hearing only for a proposed adverse *"action"*. Treating the PHA *refusal to act* as an affirmative proposed adverse *action*, as proposed by public comment, erases the deliberate statutory distinction between PHA action and non-action.

The fact that Congress did not require a grievance hearing for a PHA failure to act is clearly shown by deletion of the prior House bill language that mandated a grievance hearing on a PHA "failure to act". This legislative history was not known to the court in *Samuels*. HUD will follow the law. HUD will not pretend, as suggested by the comment, that the law passed by the Congress was the same as the bill originally passed by the House.

The law finally enacted by the Congress in 1983 does not define "adverse action". The differences between the original House bill and the 1983 law as passed indicate that the Congress intended to leave the Department a degree of administrative discretion in defining the ambit and operation of the new grievance requirement, rather than bind HUD to continue the specific grievance requirements under the old rule.

On February 5, 1988, the President signed into law a broad housing bill, titled the Housing and Community Development Act of 1987 (HCD Act of 1987) (Pub. L. 100-242, February 5, 1988). During the process leading to enactment of the HCD Act of 1987, there was an unsuccessful attempt to amend the grievance requirement under the U.S. Housing Act of 1937. The bill first passed by the House of Representatives would have amended the grievance provision to require a grievance hearing on PHA "failure to act", in addition to proposed PHA adverse "action" (proposed amendment of section 6(k) of the U.S. Housing Act of 1937 at section 119 of S. 825, as passed by the House of Representatives on 6/17/87; Congressional Record 6/17/87, H 5110). This proposed amendment was eliminated in Conference, and was not included in the law finally enacted by the Congress. The Conference Report states (Rpt. 100–426, p. 167):

> The House amendment contained a provision that was not contained in the Senate bill to clarify that the mandatory public housing grievance procedure cover[s] a PHA's failure to act, as well as its actions. *The conference report does not contain the House provisions.*
>
> Congress has always intended that the mandatory public housing grievance procedure apply to failures to act, such as failure to maintain housing in decent condition, failure to provide timely subsidy increases when incomes drop, or failure to provide appropriate utility allowances. In fact, the court ruling in *Samuels v. District of Columbia*, 770 F.2d 184 (DC Cir 1985) confirmed that PHA omissions or failures to act are grievable. HUD, however, has published proposed regulations [HUD's proposed lease and grievance rule of July 23, 1986] which create an artificial distinction between actions and omissions. Therefore, the conferees intend that HUD revise these regulations to be consistent with the ruling in *Samuels*. (Emphasis supplied.)

HUD must respectfully demur to the interpretation of the 1983 law stated in the Conference Report on the HCD Act of 1987. First, the proposed amendment of the statutory grievance requirement was not included in the 1987 Conference Report, and was not passed by the Congress. HUD is only bound by law enacted by the Congress. Second, the Conference Report is not law in itself. Third, the 1987 Conference Report language does not construe language of the 1987 law, but purports to construe language passed in a prior Congress. These after-the-fact remarks in 1987 are not part of the legislative history of the 1983 law. They are not evidence of the legislative process and thinking that led to enactment of the 1983 law. Fourth, the construction posed by the 1987 Conference is inconsistent with the actual legislative history and legislative language of the 1983 law.

b. PHA Adverse Action—(1) Proposed Rule and Comments. The rule requires a PHA to grieve on an adverse action. The rule defines (§ 966.31(a)(2)) what PHA actions are adverse actions. The PHA must give the tenant the opportunity for a grievance hearing on any proposed adverse action.

In the proposed rule, HUD defined adverse action to cover three specific cases when the PHA proposes to take action contrary to interests of the family: When the PHA seeks to evict the family, requires the family to transfer from one public housing unit to another, or determines rent or PHA charges.

Legal aid comment contends that adverse action is too narrowly defined in the proposed rule. HUD should not shave the grievance requirement to the bare minimum. Comment claims that restricting the grievance right to specific PHA actions defined in the rule violates the statutory requirement for grievance on any proposed adverse action.

Legal aid comment urges HUD to vastly open-up the types of PHA actions which must be treated as grievable adverse actions. Comment states that the rule should contain an open-ended definition of adverse action. The rule should give examples of adverse action, but recognize that other—non-listed—actions may be adverse. The family should have a broad right to grieve on PHA actions, including a PHA claim that the family has violated PHA rules, PHA issuance of a warning to the family, or a PHA demand to inspect the unit. HUD should retain a very broad grievance requirement similar to the grievance requirement under the old rule.

The PHA should give the tenant notice of the opportunity for hearing when the PHA sends any notice "adverse" to the tenant.

Legal aid comment states that grievance hearings benefit the PHA and tenant families:

—The grievance hearing is a remedy for lawless and arbitrary action by a PHA. The grievance process deters PHA misconduct.

—Tenants feel alienated and powerless. The grievance process is an outlet for tenant frustration.

—The grievance process is a good mechanism to resolve disputes. The grievance process helps PHA management, and can save time and money.

—Narrowing the grievance process is a hardship to tenants. Tenants must risk eviction to challenge PHA action.

Some comment states that the language of the rule is not clear as to whether the list of three cases which constitute adverse action under the proposed rule is an exclusive list. PHA comment asserts that the rule invites the conclusion that *any* PHA action is adverse. Legal aid comment objects to the implication that the listed cases are the only grievable adverse actions by a PHA.

In general, PHAs and PHA organizations strongly support the new grievance process proposed by HUD, and HUD's proposed definition of adverse action. The tenant should not be allowed to grieve on "any dispute" concerning PHA action or non-action. A broad grievance requirement is cumbersome, and interferes with operation by the PHA.

PHA comment on the expense and administrative burden of the old grievance requirement is also discussed in section VI.B of this Preamble (which deals with the procedure for excluding eviction cases from the PHA's administrative grievance process). Public comment on the original proposed rule (published in December 1982) discusses many of the arguments for and against changes in the scope of the old grievance procedure. Comment is summarized in the Preamble to the proposed rule published in July 1986 (Preamble, section IV.A, 51 FR 26504, 26514–15, July 23, 1986).

(2) Right to Grieve on PHA Adverse Action—(a) Definition of Adverse Action. Under the language of the 1983 law, the PHA must grieve on any proposed *adverse action* by a PHA. On the face of the statutory language, there is no duty to grieve unless three elements are present: (1) That the PHA proposes some "action" (as discussed above in section V.B.2.a of this Preamble), (2) that the action is "proposed" by the PHA, and (3) that the proposed action is "adverse" to the tenant. The statute does not obligate the PHA to give a hearing on *any* action, as urged by legal aid comment, but only on actions which are "proposed" by the PHA, and which are "adverse" to the interest of the tenant. The concept of proposed adverse action only applies to a case where the PHA is considering taking ("proposes" to take) specific, concrete and affirmative individualized action contrary to ("adverse" to) the interests of a tenant.

PHAs and tenants need to know what kinds of PHA action are "adverse" action for which the PHA must give the opportunity for a hearing. The statute does not precisely define how to apply the concept of adverse action. HUD has authority to issue a legislative rule which defines what types of PHA action must be treated as "adverse" action. This authority is based on HUD's broad power to issue rules concerning HUD programs (section 7(d) of the HUD Act, 42 U.S.C. 3535(d)), and also on HUD's specific statutory responsibility to issue regulations which implement the administrative grievance requirement (U.S. Housing Act of 1937, section 6(k), 42 U.S.C. 1437d(k)).

Under the proposed and final rules, adverse action includes a PHA decision which affects the critical interest of the assisted tenant in continuing to live in public housing (eviction), in living in the same unit (requiring tenant to move to another public housing unit), and in the amount the tenant must pay to the PHA (rent or PHA charges). The rule provides that proposed adverse action includes § 966.31(a)((2)):

—A proposed decision to terminate the tenancy, or to evict the occupants.

—A proposed decision to require the Tenant to move to another dwelling unit.

—A proposed decision determining the amount of rent or PHA charges, or the amount the Tenant owes the PHA for rent or charges.

In practice, these three types of PHA decision and action comprise the vast majority of instances in which a PHA contemplates taking concrete action adverse to the individual tenant. Indeed, it is difficult to imagine plausible scenarios of proposed PHA adverse action other than the three specified cases. However, to assure that the opportunity for a grievance hearing is not denied for "any" proposed adverse action in accordance with the 1983 law, the final rule adds to the definition of adverse action a provision that adverse action also includes a "proposed decision to take other specific, concrete, and affirmative individualized action contrary to the interests to a Tenant" § 966.31(a)(2)(iv)).

Comment states that the tenant should have the right to grieve if the PHA refuses to abate the rent for alleged PHA non-performance of unit maintenance. A PHA proposed decision determining "the amount the Tenant owes the PHA for Tenant Rent * * *" is included in the definition of proposed adverse action § 966.31(a)(2)(iii)(C)). The PHA is therefore required to grieve on the decision. A PHA's decision that the rent will not be abated is part of the positive determination of how much the tenant owes to the PHA, and is grievable under the rule.

(b) PHA Warnings. Comment suggests that the PHA should have to give the tenant a hearing if the PHA issues a warning. The PHA may tell the tenant that behavior by family members is a violation of the project rules, and that if the behavior continues the PHA may take action to evict the tenant. If the PHA ultimately takes action to terminate the tenancy, the tenant will have the right to a hearing on the proposed termination of tenancy. The question therefore is not whether the PHA must give a grievance hearing if the PHA finally decides to take action to terminate the tenancy. The question is whether the PHA must give a hearing on preliminary statements by the PHA which may or may not ever lead to any concrete action by the PHA against the tenant, whether HUD must therefore accelerate tenant's right to a grievance hearing.

HUD believes that the 1983 law does not require, and program policy does not support, imposing a Federal requirement to grieve on warnings or other initial statements by the PHA that may possibly be followed by PHA action adverse to the tenant. Acceleration of the PHA's duty to give a grievance hearing inhibits the day-to-day effort of the PHA to work out problems with tenant families, and to educate families in the responsibilities of tenancy. The issuance of a warning can be a constructive tool to induce the tenant to comply with the lease or PHA rules, avoiding the need for eviction of the family.

If the right to grieve is available too early—before a PHA has definitively decided to evict a family—the grievance requirement may inhibit frank and free communication between the PHA and the tenant. The grievance process takes up the time of PHA personnel, including the time to prepare for administrative hearings and the time to give evidence at the hearings. For this reason, PHA personnel may be reluctant to warn tenants that family behavior violates the lease or PHA rules, or that the family could be evicted if the behavior is continued. The consequence of such reluctance leads in two directions. First, the general level of project discipline may decline. PHA officials may relax the pressure for a tenant to comply with PHA requirements. Second, PHAs may proceed directly to eviction. Instead of counselling or warning a tenant, the PHA may move more rapidly to evict a family which fails to comply with the lease.

c. PHA Non-Action—Denial of Right to Grieve. Legal aid comment argues that it is bad policy to deny a sweeping right to grieve on a PHA's refusal to take action desired by a tenant. PHA failure to act should be a required grievance subject. Often PHA wrongs against a tenant take the form of the PHA's failure to act. PHA inaction can harm public housing residents. The availability of the grievance remedy should not be limited to cases of conscious proposed action by the PHA.

Comment claims that broadening the grievance right to cover PHA inaction is best for the PHA and for the tenant, or that refusal to provide a grievance process for PHA inaction is poor management. Comment states that the grievance process is an effective tool to make the PHA take necessary action, such as action to maintain tenant units. If the PHA's failure to act is not grievable, the grievance process is almost useless as a vehicle to improve conditions for individual tenants, for example by requiring a PHA to repair units that violate local code. The tenant must risk eviction to challenge PHA non-action, by raising the PHA's non-action as a defense to eviction.

According to comment, the following are examples of the types of PHA non-actions on which the PHA should be compelled to grieve: PHA violation of the lease, refusal to maintain or repair (obligations under the lease or State law), refusal to abate rent if a unit is not repaired, refusal to grant a request for transfer to another unit, refusal to adjust rent, refusal to add new family members (as authorized residents of the unit), refusal to take action against offending neighbors.

In the final rule, the PHA is required to give a grievance hearing to the tenant on any *proposed adverse action.* However, the rule does not exceed the Federal grievance right beyond the requirements of the 1983 law. A tenant does not have the right to a grievance to challenge a PHA's non-action or refusal to act.

Federal law only requires a grievance hearing on a decision by the PHA to take positive action adverse to a tenant. The law does not require grievance hearing on a PHA non-action. Public comment recommends that HUD broadly extend the hearing right to cases of PHA inaction. However, comment does not make a persuasive argument for broadly expanding the grievance requirement beyond PHA adverse action, as required by the law. The Congress has implicitly weighed the putative advantage of creating a broader grievance right against the restriction of local autonomy, and against the problems of operating a grievance apparatus that applies to PHA non-actions. HUD does not have sufficient reason to impose a duty for the PHA to grieve on PHA non-action, and PHA non-action is beyond the reach of the 1983 law.

Coverage of PHA non-action would vastly enlarge the sphere of project management potentially subject to determination by hearing officers in individual grievance hearings. Allocation of authority to hearing officers fragments the process of making decisions affecting project management and the lives of project residents. Extension of the sphere controlled by PHA hearing officers is correspondingly a contraction of the sphere controlled by PHA management. Where hearings are required, day to day actions by PHA management may be reviewed and reversed by decision of a hearing officer. For effective management, the PHA needs a broad right and ability to determine how projects are run. Dramatic extension of the grievance process dramatically diminishes the ability of the PHA to manage the housing for the over-all benefit of the residents.

An administrative hearing is sometimes a suitable process to decide if the PHA has rightly applied laws or rules to the case of a particular tenant. However, an administrative hearing is not a suitable process for determining matters committed to management discretion. The PHA decision whether or not to take action desired by a tenant most often involved matters properly committed to the judgment and discretion of the PHA, not matters that can be or should be decided by the simple and unambiguous application of a governing legal rule.

Comment states that a PHA should have to give a hearing if the PHA refuses to take action against a neighboring family. This is preeminently a type of case where the PHA must exercise a difficult and properly discretionary management judgment, that should properly be tempered by compassion for both of the families, and by the interest of other project families. The basis of decision is not readily reducible to any formula or legal rule.

Comment states that the PHA should have to give a hearing on the tenant's request for transfer to another unit (not just when the PHA has decided to make the tenant move). Comment notes, for example, that an old couple may ask for transfer to a bigger unit so that a relative can move in; a tenant may request transfer on advice of a doctor; a disabled tenant may request transfer to a suitable unit. However, these are all cases where the PHA should have administrative discretion to respond to varied circumstances. They are not cases which should be controlled by precise and inflexible rules determined in advance. Consequently also, they are not cases that should be assigned to decision by a hearing officer.

A PHA has at its disposal a limited number of units. Typically, the demand is much larger than the supply. A unit is only occupied by one family at a time. Therefore a decision to use the unit for occupancy by some particular family, such as a family that wants to move to a better unit or a bigger unit, is effectively a decision to deny the unit to other families, including families on the PHA waiting list. Thus the decision to grant or deny the transfer request is not usually controlled by a simple rule. HUD should not require that such decisions be placed in the hands of a hearing examiner.

In some cases, a tenant may claim that a PHA's failure to act is a violation of a rule—for example, a PHA's failure to maintain the unit in decent, safe and sanitary condition in accordance with the lease. Even in such cases, PHA funds and maintenance resources are limited. It is impossible for the PHA to fix all units at the same time. The PHA legitimately needs to decide the relative priority of different maintenance demands. In a context of scarce resources, the decision on how to allocate maintenance resources between different units and tenants is a legitimate management decision, not a decision that should be mechanically handed over to a hearing officer.

PHA failure to perform concrete obligations to the tenant under the law or the lease may present difficult problems, for which there is no easy or universal solution, and for which the tenant may not have any simple remedy, short of litigation. Nevertheless, the Department is not convinced that these problems can be facilely solved by imposing a national grievance requirement for PHA inaction.

Since 1975, PHAs have been subject to the extensive administrative grievance requirement under the old lease and grievance rule. This grievance requirement applied to the PHA's failure to act. Legal aid comment urges HUD to retain the substance of the grievance coverage under the old rule. However, experience under the old rule does not demonstrate that this broad grievance coverage results in a higher level of PHA compliance with the lease and the law. In comment on this rulemaking, and in other forums, PHAs assert that the old grievance requirement has been difficult and expensive to administer, and has contributed to management problems of the PHAs.

In this rule, the definition of "adverse" action is not indiscriminately extended, as advocated by legal aid comment, to all manner of miscellaneous PHA non-actions. Rather, the final rule follows the line of distinction enacted by the Congress in 1983. The rule requires a PHA to grieve on any proposed adverse action, but not on PHA nonaction. PHA comment indicates that the over-broad extension of the right to grieve can drain PHA resources, and can distort the management of public housing projects. The statutory concept of *adverse* action exhibits Congressional recognition that the grievance rights should be limited to critical and central cases when the PHA proposes to take positive action against the tenant.

Legal aid comment objects to HUD's review that the statutory concept of adverse action applies to conscious and specific individualized action contrary to the interests of the tenant. The comment states that when a PHA *denies a request* for transfer, the PHA is acting consciously, is considering an individualized matter, and is acting contrary to interests of the family. However, this example concerns a PHA *non-action* in response to a family request. The example does not concern a *proposed action* by the PHA. The tenant does not convert a PHA non-action into a grievable proposed action by submitting a request to be refused by the PHA.

The notion of "proposed" adverse action clearly conveys the statutory sense that the type of action which is grievable under the law proceeds initially from the initiative of the PHA, such as the action of the PHA in seeking to evict the tenant. In a common sense understanding, the PHA does not oridinarily "propose" to take a non-action (such as not sending a plumber to the unit).

The PHA also does not "propose" to deny action requested by the tenant. The PHA simply fails or refuses to take the requested action.

Comment assumes that the statutory requirement to grieve on "proposed adverse action" applies to PHA non-action. In this view, then, the scope of matters to be grieved would include "proposed adverse non-actions". In the real world, this concept has little meaning or potential practical application. PHAs do not "propose" to take non-action adverse to the interest of the tenant. The assertion that proposed "action" includes proposed "non-action" is not supported by the text of the statute, or by the legislative history. Rather, the test of the statute refers only to "action", and not to non-action. Further, the Congress deleted the proposed requirement to grieve on PHA non-action under the original House bill.

Comment protests that the distinction between action and non-action is somehow arbitrary. HUD remarks that the distinction proceeds directly from the plain and literal language of the statute. The Congress made this distinction by eliminating the coverage of PHA *failure to act* contained in the original House bill (see discussion of legislative history in section V.B.2.a of this Preamble). The Congress also expressed this distinction by adding to the original language of the House bill the requirement that the PHA must give the opportunity to grieve on a "proposed" adverse action. A PHA does not, in the normal sense of the term, "propose" to do nothing. The PHA proposes to take some "action", and the grievance right only applies when the PHA is proposing to take action that is also "adverse" to the tenant.

The 1983 law provides that the tenant must be advised of the "specific grounds of any proposed adverse public housing agency action" (U.S. Housing Act of 1937, section 6(k)(1), 42 U.S.C. 1437d(k)(1)). Thus the PHA must give the tenant notice of grounds for a "proposed" action. The statute contemplates notice to the tenant of a specific adverse action which the PHA expects to take in the future respecting the tenant, not notice of an already existing non-action (e.g., an alleged failure to maintain the unit) which the tenant may want to challenge.

Comment claims it is arbitrary to distinguish between a case when the PHA charges the tenant for repairs (a grievable adverse action) and when the PHA refuses to make repairs (a non-grievable non-action). Similarly comment states that it is arbitrary to distinguish between a case when the PHA requires the tenant to move (grievable) and a case when the PHA denies the tenant's request for a transfer (non-grievable). However, in these examples, there are plain and substantial differences between the actions which are grievable and the non-actions which are not. The cases which are grievable under the rule each involve a proposal by the PHA to take away something which the tenant already possesses—a public housing unit or money in the tenant's pocket. The cases which are not grievable under the rule involve the desire of a tenant for something which the tenant wants but does not yet have (such as repair of the unit, or a move to a new unit). The distinction between grievable and non-grievable cases under the statute and this rule is both reasonable and practical.

d. Termination of Tenancy or Eviction. Section 6(k) of the U.S. Housing Act of 1937, as added by the 1983 law, states the circumstances in which the PHA may exclude from its administrative grievance procedure "any grievance concerning any eviction or termination of tenancy" (42 U.S.C. 1437d(k)). Conversely, the statutory language implies that unless so excluded a PHA decision for eviction or termination of tenancy is an adverse action upon which the tenant may ask for a grievance hearing.

A PHA must have a good cause reason for action to terminate legal rights of occupancy ("termination of tenancy"), or to force the occupants to move from the unit ("eviction") (definitions in § 966.2). The statutory grievance scheme assures that the tenant may not be compelled to move from the unit without the opportunity for either an administrative grievance hearing before the PHA, or a due process hearing in State court, on the question of good cause.

"Termination of tenancy" (§ 966.2) includes a termination of the lease during the term, or a decision not to renew the lease at the end of the term.

e. Rent or PHA Charges (1) What is Grievable? The PHA must grieve on a proposed adverse action. The rule provides (§ 966.31(a)(2)(iii)) that adverse action includes a PHA's determination of:

1. The amount of tenant rent payable by the tenant to the PHA or the amount of utility reimbursement by the PHA to the tenant.
2. The amount of PHA charges in addition to tenant rent.
3. The amount the tenant owes the PHA for tenant rent or PHA charges.

The final rule clarifies that the tenant may grieve if the PHA does not conduct a reexamination of family income (i) for more than a year after the last examination or reexamination, or (ii) after receiving information concerning a change in family income or composition between regularly scheduled reexaminations (§ 966.31(a)(4)). The rule provides that the PHA's determination of the amount of tenant rent payable by the tenant to the PHA in the absence of a reexamination is included in the concept of adverse actions affecting determination of tenant rent. The PHA's decision to continue charging the amount of rent determined at a prior examination, without conducting a reexamination of tenant rent, is a positive determination of tenant rent, and is grievable under the rule.

The definition of what is grievable under the final rule covers both the PHA's determination of the tenant's rent and the PHA's determination of charges other than rent. Potentially, there are two types of issues concerning the PHA determination of rent or charges. First, the tenant may question whether PHA has correctly computed the amount of the tenant rent or PHA charge. For example the tenant may claim that the PHA has overstated family income, and that the tenant rent based on the family income should be less than the amount determined by the PHA. Second, the tenant may assert that the tenant owes less than the amount claimed by the PHA. The tenant may assert that the tenant has already paid the amounts claimed by the PHA. Both types of issues are covered by the grievance process under the rule.

(2) Need for Hearing on Determination of Rent. The amount of rent paid by a public housing tenant is determined by a statutory formula (U.S. Housing Act of 1937, section 3(a), 42 U.S.C. 1437a(a)). For most public housing tenants, the rent is 30 per cent of adjusted income. (The HUD regulation on how to determine tenant rent is 24 CFR Part 913.) Under HUD regulations, the total rent paid by the tenant ("total tenant payment") includes an allowance ("utility allowance") for a reasonable amount of utilities that must be paid directly by the tenant to the utility supplier. The tenant must pay the PHA the difference between the total rent and the utility allowance. (The difference is called "tenant rent".)

Under the rule, the tenant may ask for a grievance hearing to examine if the PHA has correctly computed the rent (but not to grieve the PHA's determination of the utility allowances for the program; see section V.D.2.b of this Preamble.) The hearing may also consider whether the tenant paid the rent determined by the PHA.

Comment suggests that the PHA should not have to give a hearing on the PHA calculation of the amount of rent, or on the PHA's determination that the tenant has not paid the rent. Comment notes that the PHA rent calculation is based on information supplied by the tenant or on third party verification. If the tenant questions the calculation, the issue can be handled by the PHA's internal supervisory review. With respect to grievance on non-payment of rent, comment states that non-payment is an objective and readily determinable fact. The hearing requirement gives a delinquent more time to pay than other tenants, and results in loss of income to the PHA.

HUD disagrees with the suggestion that non-payment of rent should not be a subject of the grievance process. There may be legitimate factual or legal questions bearing on the correctness of the PHA's decision on the amount owed by a tenant.

The final rule requires that the PHA grieve on the PHA's calculation of the amount of rent, or on the PHA's determination that the tenant has not paid the rent. For both types of question, it is often easy to decide whether the PHA determination is correct. Review of the PHA determination is the proper office of the hearing process. The tenant may raise significant and legitimate questions. In the case of a rent determination, the tenant may be able to show that the PHA misapplied HUD requirements for calculation of tenant rent to the information supplied by the tenant. In the case of a PHA claim that the tenant has not paid the rent, the tenant may be able to show that the PHA has not entered a tenant payment in the PHA books (e.g., by showing a receipt or check). If the tenant claim is frivolous or ill-founded, the claim may be quickly and readily rejected by the hearing officer.

The hearing process has a price. A hearing inevitably involves cost and administrative effort for the PHA. However, PHA determinations that a tenant must pay a specific amount of rent or charges to the PHA are clearly adverse to the tenant, and are properly identified in this rule as "adverse actions" under the 1983 law. Rent and other charges by the PHA directly affect the pocketbook of the tenant. Because families in public housing are poor, a requirement for the tenant to pay a given amount has a more serious effect on the family budget than for a family of a higher income.

Use of the hearing process may avoid the later need for eviction of the family. A tenant's non-payment of the amounts assessed by the PHA as rent or charges is one of the most common grounds for a termination of tenancy or eviction. If the hearing officer finds that the tenant is right, non-payment is generally removed as a potential ground for termination. If the hearing officer finds that the amount assessed by the PHA must be paid, then the tenant knows that the money must be paid.

The final rule provides that the tenant may grieve on the PHA's determination of the amount of rent that the tenant must pay the PHA (or the amount of utility reimbursement by the PHA to the tenant) § 966.31(a)(2)(iii)(A)).

(3) Tenant Request to Change Rent or PHA Charges—*(a) Submission of Request.* When the PHA redetermines tenant rent, the PHA must give written notice of the new rent to the tenant (§ 966.10(c)(2)). Similarly, the PHA must give written notice of any charges which are not included in the rent (§ 966.10(e)(1)(ii)). The notice informs the tenant when the new rent or charge must be paid.

After receiving notice of the rent or charge, the tenant may claim that the rent or charge is mistaken, and ask the PHA to change the determination. For example, if the PHA notifies the tenant of a charge for claimed damage to the unit, the tenant may assert that the unit was damaged because the PHA failed to perform required maintenance, and that the charge should be removed. After the PHA receives the tenant's request to change rent or charges stated in a PHA notice, the PHA may grant or deny the requested change.

The provisions of the proposed rule was intended to give the tenant the opportunity for a grievance hearing if the PHA denies a change in rent or charges when requested by the tenant. However, comment correctly notes that there is a discrepancy between the proposed rule text and Preamble. In the Preamble, a PHA's proposed decision denying a request to modify the PHA's determination of rent or PHA charges was included in the definition of proposed adverse action. In the proposed rule text, however, adverse action was defined as the PHA's proposed decision determining tenant rent or charges. Comment objects to defining adverse action as the refusal of a family's request for modification of the PHA's determination or rent or tenant charges, rather than as the original imposition of the rent or charge.

In the final rule, HUD substantially follows the approach of the regulation text in the proposed rule—the tenant may grieve the PHA's determination of rent, or of PHA charges in addition to rent (§ 966.31(a)(2)(iii)). In this approach, there is a clearer distinction between definition of the cases when the tenant has the right to grieve ("proposed adverse action"), as against definition of the PHA's authority to establish the procedures by which a tenant may exercise the right.

HUD must issue regulations which require a public housing PHA to establish and implement an administrative grievance procedure for proposed adverse action (U.S. Housing Act of 1937, section 6(k), 42 U.S.C. 1437d(k)). The PHA grievance procedure may include rules on how and when the tenant may exercise the right to a grievance hearing. The administrative grievance procedure may provide that a tenant who wants to challenge the PHA determination in an administrative grievance hearing must first ask the PHA to change the determination.

The rule provides that a tenant's request to change the PHA determination of rent or charges must be submitted in the form and manner prescribed in the PHA's administrative grievance procedure (§ 966.31(c)(1)(iv)).

(b) Deadline for Requesting Change in Rent or Charges. The administrative grievance procedure may provide that a request to change the PHA determination of rent or charges must be submitted by a reasonable deadline as determined by the PHA (§ 966.31(c)(1)(i)). Comment criticizes the absence of a requirement to notify a tenant of the deadline to request a change. The PHA should give notice that the tenant will lose the right to a grievance hearing if the tenant misses the deadline.

Comment asserts that the lack of notice violates due process. This assertion does not properly distinguish between the right to an administrative grievance hearing and the right to occupy the unit. The PHA may not repossess the unit unless the tenant has opportunity for a due process hearing to determine whether there is good cause for termination of tenancy. A due process hearing may take the form of a judicial process for eviction of the family. If the tenant does not submit a timely request to change the PHA determination, the tenant loses the opportunity for an administrative grievance hearing before the PHA. The tenant does not lose the right or opportunity for a due process judicial hearing. If the PHA moves to terminate tenancy for non-payment of the rent or charges determined by the PHA, the tenant may challenge the determination in court.

HUD agrees, however, that if the PHA wants to set a deadline for tenant to request a change in rent or charges, the PHA should give notice that the tenant will lose the opportunity for an administrative grievance hearing unless the tenant meets the PHA deadline. The final rule states (§ 966.31(c)(1)) that:

> (i) The administrative grievance procedure may provide that a Tenant who wants a change in the rent or charges determined by the PHA, as stated in the PHA notice of rent or charges, must ask the PHA to change the determination by a reasonable deadline as determined by the PHA.
>
> (ii) The PHA notice of rent or PHA charges must give notice of the deadline. The time for the Tenant to ask for a change in the rent or charges runs from the PHA notice of the deadline. The notice shall provide in substance:
>
> (A) If the Tenant believes the proposed determination is not correct, the Tenant may ask the PHA to change the determination.
>
> (B) The deadline to ask for a change.
>
> (C) The Tenant may ask for a grievance hearing on the proposed determination. If the Tenant misses the deadline to ask for a change, the Tenant loses the right to a grievance hearing.
>
> (iii) If the Tenant does not submit by the PHA deadline a request to change the rent or PHA charges stated in the PHA notice of rent or charges, the Tenant loses the right to a hearing on the proposed determination, and

the PHA is not required to give notice of proposed adverse action concerning the determination.

(iv) A request to change a proposed determination of rent or PHA charges shall be submitted in the form and manner prescribed in the PHA's administrative grievance procedure.

The rule does not require a PHA to establish a deadline for a tenant to request a change in the PHA determination of rent or charges. The choice is left to the management judgment of the individual PHA. (See also Preamble, section V.E.5, concerning establishment of a deadline for requesting a hearing.)

(4) Notice of Rent or Charges. Comment argues that the original PHA notice, which informs the tenant of proposed rent or charges, should also advise that the tenant may request modification of the proposed decision, and advise that the tenant may ask for a grievance hearing if the modification is denied. If a tenant does not ask the PHA to modify a decision that increases rent or charges, the tenant will never get notice of the opportunity to grieve (notice of proposed adverse action). Comment claims that failure to inform the tenant that there is a process to dispute the adverse action is a violation of due process (citing *Memphis Light* v. *Craft,* 436 U.S. 1(1978)).

For the following reasons, the final rule does not require notification of the right to request a modification, or of the opportunity to grieve, *at the time the PHA gives original notice of rent or charges*:

—For the most part, the rent determination is—as PHAs point out—the mechanical application of HUD requirements to information supplied by the tenant family. The suggested language tends to invite baseless requests to change routine PHA determinations of family rent, or to grieve on the determinations.

Answering a large number of ill-founded requests for modification or hearing on PHA rent determination may be a significant waste of administrative resources and money. Under the rule, the PHA's notice of rent determination states that the tenant may ask for an explanation, but does not solicit or encourage the tenant to request change in the rent. If the tenant does not agree with the PHA explanation, the tenant may then request a grievance hearing. The use of this two-step procedure tends to minimize submission of baseless tenant requests to modify the PHA rent determination. The PHA explanation may convince the tenant that the rent has been correctly computed.

Bundling additional information in a routine notice of the PHA determination of rent or charges may blur the impact of the information. The tenant may ignore notice of the opportunity to seek modification and hearing if included in the boilerplate of the annual rent determination notice. The information may have more impact if given by a separate notice of adverse action.

The procedure suggested in the comment may sometimes induce frivolous and unsupported challenges to the PHA determination, and sometimes cause a tenant to ignore real and substantial error in the PHA determination.

—Not including the suggested language (tenant may request modification, and may obtain hearing) in the original notice of rent or charges does not limit the tenant's opportunity for a statutory grievance hearing. The tenant does not lose the right to a hearing unless the PHA either (1) gives notice of a deadline to ask for a change in the PHA determination, or (2) give notice of adverse action, which explains the PHA determination of rent or charges and informs the tenant of the opportunity for a hearing.

The tenant's right to a grievance hearing is wholly preserved until the tenant receives the prescribed PHA notice. On the other hand, accelerating the notice of adverse action accelerates also the point at which the tenant loses the right to grieve on the PHA determination.

—In the public housing program, the PHA must give the tenant information about the PHA grievance procedure. The information includes a description of the circumstances in which the PHA has to give a grievance hearing—such as a dispute over the determination of rent or charges (see section V.E.2 of this Preamble). This general information is disseminated to tenants without regard to a particular adverse action or occasion of dispute.

In practice, tenants are well aware of the right to grieve—from information circulated by the PHA, and from prior personal experience, advice of legal aid or contact with other families. Since the tenant already has general knowledge of the grievance procedure, there is less need to remind the tenant that there is a grievance procedure each time the PHA gives notice of a determination of rent or charges. (By contrast, in the *Memphis Light* case cited in public comment the affected public did not know there was a procedure for protecting utility bills, a written account of the procedure was not accessible to the public, and the opportunity to invoke the procedure depended on word of mouth referral. In *Memphis Light,* utility service could be terminated for non-payment of the utility bills without notice of the administrative procedure for challenging the proposed determination (436 U.S. 1, 14 n. 14.))

—In the case of a PHA's proposed determination of rent or charges, the PHA may not evict the tenant from the unit, for non-payment of the rent or charges assessed by the PHA without the opportunity for a due process judicial hearing.

—Due process does not require notice of hearing rights at the time of the original notice of the PHA determination of rent or charges. Due process calls for such protections as particular circumstances demand, considering the private and government interest affected, and the value of procedural protections. The balance of affected interests does not support a claim that there is any due process right to notice of adverse action when the PHA gives original notice of a proposed determination of rent or PHA charges.

(5) Payment of Rent as Condition for Grievance Hearing—*(a) General—(i) Regulation.* The old rule provides that the PHA does not have to schedule a grievance hearing on the PHA determination of tenant rent unless the tenant pays the PHA in escrow the amount of the rent due on the first of the month before the "act or failure to act" (e.g., a proposed rent increase) on which the tenant wants to grieve, and then continues to pay the same monthly rent until the grievance is decided. If a tenant wants to challenge a rent increase determined at the annual reexamination, the tenant pays the pre-increase rent until the hearing officer renders a decision on the grievance.

The new rule (§ 966.31(d)) also allows the PHA to require payment of tenant rent, as determined by the PHA, as a condition for granting the tenant a hearing to grieve on the rent. The tenant must pay the amount of rent due, and must continue to pay the rent promptly until the grievance is decided (§ 966.31(d)(1)(i)). However, if the tenant disputes an increase in the rent, the tenant pays the pre-increase rent until the hearing officer renders a decision (§ 966.31(d)(1)(ii)).

The effect of the new rule is broadly similar to the old rule. Under both versions, a tenant who wants a grievance hearing to challenge a proposed increase in the rent pays the pre-increase rent until the grievance is resolved. Except for an increase, the tenant must pay up rent due the PHA pending completion of the grievance hearing. The new rule provides (§ 966.31(d)(1)):

> (i) The Tenant may request a grievance hearing on a proposed adverse action * * * concerning Tenant Rent * * *. Unless the Tenant has paid the PHA the full amount of the rent the Tenant owes, as determined by the PHA * * *, and continues to make such payments promptly until completion of the grievance hearing, the PHA is not required to commence or continue a grievance hearing concerning Tenant Rent.
>
> (ii) The Tenant may challenge an increase in the Tenant Rent as determined by the PHA at reexamination. As a condition for obtaining a grievance hearing on the increase, the PHA may require the Tenant to pay the PHA the amount of the Tenant Rent in effect before the increase until completion of the grievance hearing.
>
> (iii) The Tenant may challenge the amount of a decrease in the Tenant rent as determined by the PHA at reexamination, or may challenge a determination at reexamination that the Tenant Rent will not increase or decrease. As a condition for obtaining a grievance hearing on the amount of Tenant Rent, the PHA may require the Tenant to pay the amount of the Tenant Rent, as determined by the PHA at reexamination, until completion of the hearing.

(ii) Interest of Tenant and PHA. Legal aid comment objects to allowing the PHA to require a tenant to pay rent as a prerequisite for grievance on the rent. Comment objects to requiring payment of rent, to requiring payment of rent which is disputed, or to requiring payment of back rent (accrued before the tenant seeks a hearing). On the other hand, PHA comment states that the tenant should not have the right to a hearing unless the tenant pays all disputed rent, including a rent increase determined by the PHA.

The purpose of the grievance hearing is to secure a decision on how much the tenant owes the PHA. In HUD's view, the question of when a PHA should be allowed to make the tenant pay rent as a prerequisite for a grievance hearing, and how much, depends on a balance of interests.

The tenant has an interest in securing a hearing on the issue, and in minimizing encumbrances on the opportunity for a hearing. A requirement to pay disputed rent, before the tenant has a hearing on whether the rent should be paid, is a burden for the tenant. The tenant must put up the disputed rent or give up the opportunity for an administrative hearing.

The PHA has an interest in prompt payment and collection of rents. Promoting this end accords with statutory policy expressed in the U.S. Housing Act of 1937 (section 6(c)(4)(B), 42 U.S.C. 1437d(c)(4)(B)). Nonpayment of rent reduces amounts available for operation of the housing. Allowing the tenant to delay the payment of rent pending hearing diminishes the tenant's incentive for prompt payment, and increases tenant delinquencies in payment of rent.

(b) Payment of Disputed Rent. Legal aid comment asserts that the tenant should not be required to pay disputed rents until there is a decision whether the disputed amounts should be paid. The PHA can collect the amounts after a hearing. If the PHA miscalculates rent, the tenant may not have the money to pay the amount assessed by the PHA. Legal aid comment objects to requiring the tenant to pay money tenant may not have, in order to get a hearing on whether tenant has it. If the tenant cannot pay the amount demanded, the tenant is denied the right to grieve.

PHA and NAHRO comment states that public housing residents should pay whatever rent or charges are assessed by the PHA. After a hearing decision, the PHA can retroactively adjust the amounts paid by the tenant.

In the view of this Department, it is not true, as claimed by the legal aid comment, that the PHA can simply wait and later collect unpaid rents after a hearing decision is rendered. In many cases, the PHA will not be able to collect, or will not be able to collect the full amount owing. A PHA will have a harder time collecting a large amount than a small amount. A tenant will have more difficulty in paying amounts owed to the PHA the larger the accumulated debt. During the hearing process, a tenant may vacate the unit or may be evicted. It may then be too expensive or impractical for the PHA to find and collect from a tenant who no longer resides in the housing. It is common sense that a delay in rent collection can reduce the amount that is ultimately collected. The collection loss because of delay in collection is more marked in a population of poor families.

Any payment—including payment of the statutory rent—is a demand on limited family resources. Many poor families will not have the financial discipline to put away money to cover the accumulated rent debt that will be owing if the hearing officer sustains the PHA determination of rent owed by the tenant. A tenant may be able to make current monthly payment of the amounts claimed by the PHA, and which the tenant wants to contest. If the tenant does not have to make disputed monthly rent payments during the hearing process, and if the hearing decision finally supports the PHA, the tenant may not have money to pay the accumulated debt.

Allowing the tenant an effective moratorium on payment of disputed amounts during the hearing process encourages the tenant to run up a debt the tenant will not be able to pay. If the tenant does not pay up back rent after a hearing, the PHA is confronted with a hard choice between allowing the tenant to stay without payment, or evicting. Failure to evict a tenant who does not pay will stimulate rent delinquency by other tenants. To preserve rent collections, the PHA may be forced to evict. Permitting a tenant to withhold payment of disputed rent during the hearing process, building up an unpayable debt to the PHA, may finally lead to eviction of the tenant.

Permitting withholding during hearing creates an incentive for mis-use of the hearing process. Tenants will be tempted to file grievances in order to delay the payment of rent, not just to raise bona fide disputes over the PHA rent calculation.

(c) Payment of Increase or Decrease in Rent. At a reexamination, the rent may increase, decrease, or stay the same. Under the old rule, a tenant who wants to grieve the rent determined by the PHA at reexamination continues to pay the same monthly rent as before the reexamination ("the rent due and payable as of the month preceding the month in which the act or failure to act [the reexamination] took place" (old rule § 966.55(e)), regardless of whether the change at reexamination is an increase or a decrease of the prior rent. If the PHA has determined a lower rent at reexamination (because of a fall in family income), but the tenant alleges that the decreased rent is still too high, the tenant would have to pay the old rent pending hearing, rather than the lower rent determined at reexamination.

This rule provides that if the tenant challenges an *increase* in the rent at a reexamination, the tenant must pay the pre-increase rent until the issue is decided at hearing (§ 966.31(d)(1)(ii)). Otherwise the tenant must pay the rent determined by the PHA at the reexamination (§ 966.31(d)(1)(iii)). If the PHA decreases the rent, the tenant pays the decreased rent determined at reexamination. The tenant gets the immediate benefit of the decreased rent initially determined by the PHA.

Legal aid comment asserts that if the rent is decreased, and if the tenant challenges the amount of the decrease, the tenant should only be required to pay the undisputed portion of rent. PHA and NAHRO comment argues that pending outcome of a grievance hearing a tenant should have to pay whatever rent is determined by the PHA, including an increase. Allowing the tenant to pay the pre-increase rent gives the tenant an incentive to postpone payment of rent by filing a grievance. Consequently, this practice causes an increase in filed grievances, in tenant receivables, and in non-productive use of PHA staff.

According to PHA comment, the greater the increase in rent, the more likely that a tenant will initiate a request for a grievance hearing. A tenant will face substantial payments if the tenant loses at the hearing. Allowing the tenant to pay pre-increase rent causes hardship to a tenant who cannot pay accumulated back rent. Increased rent should be effective immediately, even if the tenant wants to grieve. If the grievance is upheld, the PHA can grant a credit or refund to the family.

HUD is impressed by the argument that allowing a tenant to hold back any part of the rent produces an incentive to grieve for the sake of delaying payment, and therefore an incentive for assertion of phony grievances. A PHA which delays collection of rents due from public housing families will suffer a collection loss because of the delay. Reducing pressure for payment from a public housing tenant will affect collection of rent from other tenants in the PHA's program. The authority for a tenant to postpone payment of rent during a grievance generates administrative burden for the PHA in processing delinquencies and handling grievances. Permitting a tenant to put off payment of rent determined by the PHA can eventually cause a hardship when the tenant must pay the accumulated rent. A postponement of collection may lead to eventual eviction of the family.

In this final rule, the tenant is not required to pay a rent increase determined by the PHA at reexamination in order to grieve on the PHA determination. Otherwise, the tenant must pay the amount determined by the PHA, even if the tenant seeks a reduction in the amount determined by the PHA. This posture is a reasonable balance of the interests affected.

Respecting the desire of the PHAs for immediate collection of a rent increase determined at reexamination, we note that a PHA can attempt to accelerate the grievance process in order to mimimize rent loss and other harmful effects. The PHA can set a deadline for requesting modification of the rent determined by the PHA (§ 966.31(c)(1)(i)), or a deadline for seeking a grievance hearing after notice of adverse action (§ 966.31)(c)(2)). By moving up the point at which the PHA gives notice of adverse action, the PHA can also move up the time for the tenant to seek a grievance hearing on the adverse action, and the time for conducting the hearing.

The PHA can give notice of adverse action (explaining the specific grounds for the PHA rent redetermination) at the same time that the PHA gives notice of the new rent redetermined by the PHA (§ 966.31(b)(2)(iii)). The PHA may be able to complete the grievance hearing before or soon after the scheduled effective date of reexamination, thus avoiding delay in the point at which the tenant must pay the rent increase determined by the PHA, but without compromising the right of the tenant to a grievance hearing on the PHA determination.

Several factors tend to minimize the incentive for a tenant to abuse the grievance process as an excuse for delaying payment of a rent increase. A tenant who holds back any part of the rent does not have a free ride.

—*First,* contrary to recommendations in legal aid comment, the rule does not prohibit the PHA from imposing late charges for a tenant who holds back payment of a rent increase during the grievance process. If the hearing officer sustains the increase, the tenant may have to pay additional charges assessed because of the late payment of rent.

—*Second,* there is nothing that precludes the PHA from taking steps to terminate the lease and evict the tenant for failing to pay the increased rent determined by the PHA. If eviction is excluded from the PHA grievance process, the PHA may bring the court action for dispossession, without any prior grievance hearing. Of course, the tenant can contest the PHA's rent determination in the State court eviction proceeding.

HUD does not adopt the legal aid recommendation that a tenant should only pay amounts which are undisputed. Under the final rule, a tenant who wants the opportunity for a hearing on a rent increase at reexamination must at least continue to pay the rent the tenant was paying before the reexamination. Continunance of rent at the level previously determined (and on which the tenant had the prior opportunity to grieve) is not a new and unexpected burden for the tenant.

The legal aid position would effectively destroy the requirement for the tenant to pay rent as a condition for hearing. If a tenant does not have to pay rent which is "disputed", the tenant has carte blanche to dispute any or all of the rent and to obtain a grievance hearing. Unlike the authority to withhold an *increase* in the rent assessed by the PHA, there is no external objective criterion governing the amount that may be withheld. The tenant unilaterally decides what is to be disputed and withheld.

If the tenant can hold back any portion of the rent, a tenant may be greatly tempted to raise insubstantial disputes for the sake of delaying the payment of rent, and tempted to enlarge the portion of the rent which is ostensibly disputed. The practice of withholding rent is likely to spread, as other tenants discover that rent payments can be disputed and postponed. The threat of late charge or eviction may not stem the flow of frivolous claims. Tenants may not appreciate the risks of PHA adverse action. If a tenant expects to move from the unit before arrearage is collected, the tenant may deliberately seek to string out the need for payment as long as possible.

Open-ended withholding of rent by public housing tenants may dramatically damage PHA finances. Authority to withhold a rent increase is intrinsically limited to the amount of the increment over prior rent. By contrast, a withholding of all disputed amounts potentially reaches the PHA's whole stream of rental income. Any delay in collection of rent may harm the financial interests of the PHA. The greater the amount that is withheld, the greater the potential damage to finances of the PHA.

The U.S. Housing Act of 1937 (section 6(c)(4)(B), 42 U.S.C. 1437d(c)(4)(B)) authorizes HUD to prescribe procedures and requirements for PHAs to establish:

> satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of nonpayment of rent * * *.

The PHA should not be required to grieve on issues related to a PHA determination of tenant rent while the tenant is refusing to pay the rent in effect prior to the determination.

(d) Payment of Back Rent. Under the proposed rule, a family which wants to grieve on the PHA rent determination must pay the full amount, as determined by the PHA, of the tenant rent due and payable by the family (except for a rent increase). Legal aid comment objects to imposing a requirement for payment of back rent as a condition for hearing. Comment claims that requiring payment of back rent is objectionable if the tenant is disputing the rent claimed by the PHA, and that the requirement violates both due process and the statutory grievance right.

Comment alleges that the burden on the tenant from requiring payment of back rent is disproportionate to the benefit to the PHA. Comment asserts that the PHA's sole interest is to assure that the grievance process doesn't result in financial detriment by accumulation of additional rent during the grievance process. The comment argues that if the PHA is conceded a right to demand payment of rent as a condition of hearing, the PHA should only be allowed to require payment of rent accruing after the tenant's request for a hearing.

Legal aid comment which objects to requiring payment of back rent also objects to requiring payment of any disputed rent. Thus the PHA would only be allowed to require payment of rent which is undisputed, and which accrues after the tenant's request for a grievance hearing. The PHA would not be allowed to collect back rent—even if the tenant's obligation to pay the back rent is undisputed—accrued before the tenant's request for a hearing. Comment also objects to allowing the PHA to impose any penalty for late payment of rent, objects to imposing any deadline for requesting a grievance, objects to permitting the PHA to evict while the tenant is grieving the nonpayment of rent, objects to allowing a PHA to bypass the grievance process for a termination of tenancy, and urges the adoption of elaborate grievance procedures that will afford the tenant ample opportunities to delay the hearing process.

If adopted in tandem, the positions urged in legal aid comment will systematically encourage a tenant to withhold rent payable to the PHA, and to dispute the PHA's computation of the rent for the sake of enlarging the amounts that may be safely withheld. Tenants will put off payment of rent to the last possible moment, when the hearing officer has rendered a decision. The position advocated by comment is an invitation to financial disaster for the PHA, and will undermine the encouragement of tenant responsibility for payment of rent.

Comment states that the PHA should only be able to collect undisputed rent which accrues after the tenant requests a hearing. This approach allows the tenant to manipulate the amount which must be paid as a condition for hearing, by putting off the point at which a hearing is requested. The tenant is offered an incentive to delay the hearing request as long as possible, and thus to hold off the payment of rent. The proposal discourages prompt payment of rent, and is contrary to the spirit of the statutory directive to establish procedures designed to assure prompt payment and collection of rent (U.S. Housing Act of 1937, section 6(c)(4)(B), 42 U.S.C. 1437d(c)(4)(B)).

Under the final rule, the amount of rent which must be paid by the tenant in order to get a hearing is not affected at all by the point at which the tenant decides to request a hearing. Whenever the tenant requests a hearing, the tenant must pay the amount due, as determined by the PHA. Thus the tenant has no reason to delay requesting a hearing, or to hold back the payment of rent. Instead, a tenant with a bona fide cause of grievance has an incentive to have the grievance heard as soon as possible, so that the rent paid is reduced as soon as possible, upon a favorable resolution of the grievance.

The final rule provides that the tenant must pay the full amount owed, as determined by the PHA (except for a challenged increase in the rent as determined at reexamination). The tenant must pay back rent accrued before the tenant's request for a hearing.

Comment acknowledges that the PHA has a financial interest in collecting amounts accrued during the hearing process, but claims that the PHA does not have a sufficient interest to justify requiring payment of back rent as a condition for hearing. HUD rejects the artificial distinction between the PHA interest in collecting back rents, as against the PHA interest in collecting additional amounts that come due during the hearing process. The amounts owed by a tenant before the grievable event (proposed adverse action), or before the tenant's request for a hearing, may exceed amounts that accrue subsequently and prior to hearing.

The PHA has a financial stake in collecting any amount that the tenant owes to the PHA. If the PHA does not collect rent promptly, rent revenues will be lost. Requiring the tenant to pay rent as a condition for hearing helps to maintain pressure for payment of rent. This proposition applies equally to back rent, as to rents which accrue during the hearing process.

(e) Legality and Constitutionality of Requiring Rent Payment as a Condition for Hearing. Comment claims that requiring the tenant to pay rent as a condition for hearing is unconstitutional, and deprives the tenant of the statutory right to a hearing under the 1983 law.

Comment wrongly asserts that the requirement amounts to an unconstitutional seizure of family property. In fact, however, no property is seized by the PHA. The tenant either deposits the amounts required, or fails to make the deposit. If the tenant fails to make the deposit, the tenant is not entitled to an administrative grievance hearing. The tenant does not lose possession of the money. The tenant loses the right to an administrative grievance hearing on whether the money is owed to the PHA.

Foreclosure of the right to an administrative grievance hearing before the PHA does not foreclose the opportunity for a hearing. If the tenant does not pay the rent, the PHA may bring a judicial action seeking repossession of the unit, or seeking a judgment for amounts owed by the tenant. The rule does not authorize the PHA to seize a tenant's funds or other property without the opportunity for hearing. To the contrary, the rule provides (§ 966.11) that the lease may not include provisions which would allow the PHA to take or hold family property without notice to the tenant, and a court decision on the rights of the parties. The right of the PHA to take money or other personal property of the tenant and household prior to judgment is governed by State law and State procedures for pre-judgment seizure. Operation of the State law and procedures for pre-judgment seizures is subject to Constitutional requirements. The HUD rule does not attempt to prescribe rules for pre-judgment attachment or other creditor remedies.

The requirement to pay rent as a condition for an administrative hearing does not deny tenant the opportunity to grieve on a PHA adverse action. The payment of rent is merely a reasonable condition governing the tenant's access to the administrative grievance process. HUD has plain statutory authority to regulate the prerequisites and procedures for a grievance hearing (U.S. Housing Act of 1937, section 6(k), 42 U.S.C. 1437d(k); HUD Act, section 7(d), 42 U.S.C. 3535(d)).

Comment asserts that a requirement to escrow rent penalizes a tenant for exercising the right to a grievance hearing, and will chill tenant's exercise of the grievance right. However, the tenant is required to pay the rent determined by the PHA whether or not the tenant seeks a hearing on the PHA determination. Payment of rent is not a special requirement or penalty imposed on a tenant who wants a hearing, but is a regular incident of the assisted tenancy.

The U.S. Supreme Court has specifically rejected the contention that a requirement to pay disputed rent pending hearing is a denial of due process. In *Lindsey* v. *Normet,* 405 U.S. 56, 66–67, 92 S. Ct. 862, 870–71 (1972), tenants claimed a denial of due process of law:

> Because the rental payments are not suspended while the alleged wrongdoings of the landlord are litigated. *We see no Constitutional barrier to [the State's] insistance that the tenant provide for accruing rent pending judicial settlement of his disputes with the lessor.*

The Supreme Court held that requiring a tenant to pay rent to obtain continuance of an eviction hearing is not irrational or oppressive (405 U.S. at 56).

In *Head* v. *Jellico Housing Authority*, Civ. No. 3-87-339 (E.D. Tenn, filed February 17, 1988), the U.S. District Court rejects the claim of a public housing tenant that a grievance hearing was improperly terminated because of tenant's failure to pay rent into an escrow account pursuant to the old lease and grievance rule. The District Court holds that a tenant may be required to pay both disputed and undisputed rent into escrow as a condition for obtaining a grievance hearing. "The failure to make escrow payment terminates the grievance procedure and constitutes a waiver of the tenant's rights under the grievance procedure."

In the *Head* case, the District Court also rejects tenant's contention that due process entitles the tenant to a hearing before the assessment of public housing rent increases. The court states that "the Fifth Amendment does not require that public housing tenants be accorded an opportunity for a due process hearing before their rents can be increased".

(f) *Elimination of Requirement to Deposit Tenant Payments in Escrow.* The old rule provided that tenant payments which are required as a condition for scheduling a grievance which involves the amount of rent must be deposited in an "escrow account" until the grievance is decided. The new rules does not require the PHA to put the tenant payments in an "escrow account" or require any special procedure for segregating or handling the monies paid by the tenant.

Of course, once the grievance is decided, the PHA will have to act in accordance with the grievance decision, including a decision requiring the PHA to refund collected amounts in excess of the amounts owed by the tenant to the PHA.

(6) Grievances Other Than Disputes Over Rent—Requiring Payment as a Condition for Hearing—(a) *Payment of Disputed Charges.* The proposed rule would allow a PHA to require payment of rent as a condition for granting a hearing on the PHA's determination of rent. The Preamble noted that, as under the old rule, this authority "applies only to rent, not to the PHA's determination respecting other charges imposed on the family" (51 FR 26518, 1st col., July 23, 1986). Comment poses questions concerning authority of a PHA to require some payment as a condition for hearing on matters other than rent.

Comment states that the rule is not clear on whether a tenant must pay disputed PHA charges other than rent to get a hearing on the PHA's assessment of the charges. Comment observes that payment of disputed charges will be a hardship for the tenant. The final rule (§ 966.31(d)(2)) explicitly states that the PHA may not require payment of charges as a condition for granting a grievance hearing. The rule provides that:

> The PHA may not deny the opportunity for a grievance hearing on a proposed adverse action * * * concerning the PHA's proposed decision determining the amount of PHA charges in addition to rent, or the amount the Tenant owes the PHA for PHA charges in addition to rent, on the ground that the Tenant has not paid the PHA the full amount, as determined by the PHA, of the charges the Tenant owes to the PHA.

This revision is in accordance with the old rule, and with the intention of the proposed rule, as expressed in the Preamble.

The rule does not treat PHA non-rent charges the same as rent. The PHA has less interest in demanding payment of charges prior to hearing, than in requiring payment of rent. First, the aggregate amount of regular rent collections is ordinarily much greater than the aggregate amount of tenant charges. For this reason, a delay in payment of tenant charges during the time necessary for hearing will have a much less severe effect on the flow of revenues needed to operate public housing projects. Second, the PHA's determination of charges other than rent is more likely to hinge on special circumstances, or legitimately disputable facts, than the PHA's routine determination of the rent. There is probably a considerably greater rate of error in determination of PHA charges, and consequently a greater likelihood that the charge will be reversed or denied at hearing. The tenant has therefore a greater interest in having the grievance heard before paying the amount determined by the PHA.

(b) *Grievance on Termination of Tenancy.* PHA comment recommends that the requirement to pay rent as a condition for hearing should apply to a grievance on any termination of tenancy, not just to a grievance on payment of rent. The PHA states that a tenant who wants to grieve on a termination of tenancy should be required to remain current in rent, so that the grievance process is not used to delay an inevitable eviction and provide free rent for the tenant.

The PHA recommendation is not adopted. The PHA's financial interests are adequately protected by requiring payment of rent determined by the PHA as a condition for a grievance hearing on the PHA's determination of the rent.

(7) Relation of Grievance on Non-payment of Rent to Administrative Hearing on Termination of Tenancy. The PHA determination of rent, or the PHA determination to terminate tenancy or evict the occupants, are both subjects on which the PHA is required to grieve. Non-payment of rent is a common ground for the PHA decision to evict. The tenant's grievance on the PHA's rent determination may turn on some of the same issues as a grievance on the PHA's decision to terminate the tenancy for non-payment of rent, or as a judicial action to evict for non-payment. Here we consider the relation between a tenant's right to an *administrative* grievance hearing on rent and the right to an *administrative* grievance hearing on a termination of tenancy.

Non-payment and termination are separate grievable subjects, but the regulation does not require duplicative grievance hearings on the same facts or issues. Issues concerning non-payment of rent may be heard in a grievance hearing process before or separate from a grievance hearing for termination of tenancy for non-payment. Alternatively, issues concerning non-payment and termination may be bundled in a single hearing process, where the tenant challenges the PHA's decision to terminate the tenancy for non-payment of rent. Once resolved by decision of the PHA-hearing officer, issues concerning determination and payment of rent need not be reheard in a grievance hearing on termination of tenancy.

If the PHA decides to terminate the assisted tenancy for non-payment of rent previously determined by the PHA, the tenant's right to grieve on the proposed decision to terminate does not enlarge the tenant's right to grieve on the original determination of tenant rent. If the tenant does not request a grievance hearing by a deadline imposed by the PHA (§ 966.31(c)(2)), the tenant loses the right to grieve on the PHA's determination of rent. Once lost, the right to grieve on that issue is not restored by the PHA's subsequent act to terminate the tenancy for non-payment of the rent so determined. The tenant may grieve the fact of non-payment, or the existence of legal grounds for termination because of the non-payment. However, in the hearing on termination of tenancy, the tenant is not entitled to re-open the barred issues concerning correctness of the PHA rent determination.

The procedure for handling overlapping grievance issues may be regulated in the grievance procedures adopted by a PHA. The power of the hearing officer to manage the conduct of the grievance hearing under the PHA grievance procedure may encompass the power to decide how different grievable issues may be fairly and efficiently heard.

f. Requiring Tenant to Move. In certain circumstances, the tenant must move to another public housing until when requested by the PHA (§ 966.10(h)(1)(v); see discussion at section III.I of this Preamble). The rule provides that the PHA's decision requiring the tenant to transfer to another dwelling unit is an adverse action—that is, a subject on which the PHA is required to grieve (§ 966.31(a)(2)(ii)). The PHA's decision to move the tenant does not terminate public housing assistance on behalf of the tenant. Nevertheless, the decision so directly affects the tenant's security of occupancy that the proposed decision is treated as a proposed adverse action.

If a PHA has properly excluded eviction from the PHA grievance process, the PHA may bring action for eviction without a prior grievance hearing (see Preamble, section VI.D.5). After a State court decision that a tenant may be evicted, the PHA will ordinarily take whatever action is necessary to force the tenant and other occupants to move from the unit in accordance with State law. PHA and NAHRO comment requests clarification that the PHA does not have to give a grievance hearing when the tenant is forced to move pursuant to the court decision in the eviction proceeding. The final rule clarifies, as originally intended, that the PHA is obliged to grieve when the PHA decides to require the tenant to move *to another dwelling unit* (§ 966.31(a)(2)(ii), cf. also section III.I of this Preamble).

Conversely, however, the PHA is not obligated to grieve if eviction is properly excluded from the PHA grievance process, and the PHA takes action to execute a judicial decision which allows the PHA to evict the tenant from the unit in accordance with eviction process under State or local law. The statute and rule allow exclusion of "eviction" from the PHA grievance process. "Eviction" is defined as "forcing the occupants *to move out* of the dwelling unit" (§ 966.2). Once the landlord-tenant court decides that the PHA may evict the occupants, the PHA may proceed with the eviction—that is may force the occupants to move. Since eviction is excluded from the grievance process, the PHA has no obligation to provide any further opportunity for a grievance hearing on the eviction.

C. Who May Grieve?

The 1983 law requires the PHA to establish a grievance procedure in which "tenants" have the opportunity to be heard in an administrative grievance hearing on proposed adverse action (U.S. Housing Act of 1937, section 6(k); 42 U.S.C. 1437d(k)). However, grievance requirements in the proposed rule were vested in the "family", thus leaving room for the PHA to determine in its grievance procedures how the family will exercise the grievance right, and through which family members.

The final rule specifies that the right to grieve rests with the "tenant", the member of the assisted family who leases the unit from the PHA. References to "family" in the proposed grievance regulations are systematically replaced by references to the "tenant". This revision assures that the PHA grievance procedure places the grievance right in the tenant, in accordance with the literal terms of the 1983 law. The revision also removes ambiguity as to who holds rights under the grievance procedure. For example, the revision makes clear that the PHA's notice of the grounds for proposed adverse action must be directed to the "tenant", as required under the 1983 law (U.S. Housing Act of 1937, section 6(k)(1), 42 U.S.C. 1437d(k)(1); section 966.31(b)).

The change in the grievance procedure is parallel to changes in the statement of regulatory lease requirements. As under the PHA grievance procedure, the "tenant" is the subject of all rights under the lease.

D. Purpose of Hearing on Proposed PHA Adverse Action

1. Regulation Provisions

The hearing process under section 6(k) of the U.S. Housing Act of 1937 is intended to assure that decisions by the PHA with respect to an individual tenant comply with applicable rules. The hearing process does not displace the regular PHA administrative process for matters committed to PHA discretion and management judgment. The rule states that the purpose of the hearing on a proposed PHA adverse action "shall be to review whether the proposed adverse action by the PHA is in accordance with the lease, or with law, HUD regulations or PHA rules" (§ 966.31(a)(3)(i)).

The concept of adverse action, and the requirement for hearings on a proposed adverse action, apply only to proposed decisions by the PHA "concerning an individual Tenant" (§ 966.31(a)(2)). The rule provides (§ 966.31(a)(3)(ii)) that:

> "PHA action or non-action concerning general policy issues or class grievances (including determination of the PHA's schedules of allowances for PHA-furnished utilities or of allowances for Tenant-purchased utilities) does not constitute adverse action by the PHA, and the PHA is not required to provide the opportunity for a hearing to consider such issues or grievances."

2. Response to Comment

a. Exclusion of Policy Issues and Class Grievances From Hearing Process. Some comment agrees with HUD that the rule should include an explicit and unequivocal statement describing the purpose of a grievance hearing. The wisdom or appropriateness of policy, rule, regulation or law are not at issue in the hearing. Other comment argues that the grievance hearing should be used for policy issues and class grievances, since these questions affect a whole class of residents. Where many tenants have disputes which affect each tenant individually, but in roughly the same manner, it is more efficient to handle disputes on a class action basis.

The exclusion of class grievances and policy issues in this rule is essentially similar to the old lease and grievance rule. Although the old rule allowed the tenant to grieve on almost any manner of individual dispute with the PHA, the grievance process was only a forum for determination of individual grievances. (See especially § 966.51(b) of the old rule.) The Supreme Court has noted that public housing grievance procedures" * * * are open to individual grievances but not to class actions" (*Wright* v. *Roanoke*, 479 U.S. ____, ____, 107 S. Ct. 766, 772 (1987)). The Supreme Court also stated that the local PHA grievance processes required under the U.S. Housing Act of 1937" * * * are not open to class grievances * * *." (*Wright* v. *Roanoke*, 479 U.S. at ____, 107 S. Ct. at 773 (1987)).

The 1983 statute requires a PHA to establish and implement an administrative grievance process for proposed adverse action against a tenant. The law was intended to open a forum to resolve issues raised by individualized PHA action concerning the individual tenant. The law was not intended to convert the administrative grievance process into a forum for resolution of broad class and policy grievances.

Comment which proposes that the grievance process should be a vehicle for decision on class issues is plainly motivated by the desire to maximize the capacity to mount broad challenges to PHA decision and PHA authority. Those who attack PHA determinations would have a greater power to overturn PHA actions with a minimum expenditure of resources and funds, in particular with a minimum use of available legal aid resources.

The proposed change, as proposed by such comment, in the purpose of the grievance process would, however, diminish the authority and discretion of the PHA to manage the public housing program. The proposed change would very greatly increase the risk of major distortion and damage in administration of the PHA program. The PHA should instead retain management authority to develop appropriate local procedures to handle class and policy issues. In the case of policy issues, there is no governing legal rule, and the authority for management decisions should rest with project management (including authority of a resident management corporation under section 20 of the U.S. Housing Act of 1937, as added by section 122 of the Housing and Community Development Act of 1987, Pub. L. 100–242, February 5, 1988). The authority to decide policy for management of public housing should not be transferred to a hearing officer. The hearing officer does not have ongoing responsibility for project management. In the case of legal issues, a question which could affect many tenants can be considered and tested in a hearing for a single tenant.

A PHA has the freedom to develop a variety of local procedures to handle legal or policy issues that affect tenants as a whole, or large groups of tenants. The PHA may elect to assign issues for decision by tenant management, or may develop procedures for submission and consideration of public and tenant views. This rule should not divest the PHAs of local autonomy to work out different kinds of processes for determination of different kinds of issues. HUD will not force PHAs to resolve class and policy issues through a forum designed for the resolution of particular legal disputes between the tenant and the PHA.

b. Tenant Allowance for Utilities. The rule provides (§ 966.31(a)(3)(ii)) that the grievance process does not apply to the PHA's determination of the schedule of allowances for utilities (including allowances for Tenant-purchased or PHA-furnished utilities). Comment asserts that there is no basis for excluding determination of utility allowances from the grievance process, and that the exclusion will lead to avoidable litigation.

A PHA determination of utility allowances for the public housing program is a technical determination by PHA management, based on the pattern of utility costs and consumption in the PHA jurisdiction (see Part 965, Subpart E). This process is and should be different from the process for determining whether the PHA has violated some law or rule respecting the individual tenant, such as a determination whether the PHA made a mistake in determining family income, or in computing rent based on the family income. HUD regulations establish a separate procedure specially designed for the determination of utility allowances, and for soliciting tenant comments on the determinations (§ 965.473). The Supreme Court has noted HUD's consistent historical position that the grievance procedures do not apply to determination of a PHA's utility allowance schedule (*Wright v. Roanoke*, 479 U.S. ____, ____, 107 S. Ct. 766, 773 n. 8 (1987)). The Supreme Court held that a tenant has an enforceable right to a reasonable utility allowance, and may bring a judicial action to enforce the right under 42 U.S.C. 1983.

E. Hearing Procedure

1. General—Administrative Grievance Procedure

The 1983 law states requirements for a hearing on proposed adverse action (section 6(k) of the U.S. Housing Act of 1937, 42 U.S.C. 1437d(k)). The statute does not, however, incorporate the procedural details of the old lease and grievance rule. The new rule requires the PHA to establish a hearing procedure which complies with the basic elements described in the 1983 law.

The rule provides (§ 966.30(b)) that the PHA must establish and implement an administrative grievance procedure for any proposed adverse action. The PHA is required to adopt a written administrative grievance procedure in accordance with HUD requirements (§ 966.30(c)).

2. Information for Tenant—General Description of PHA Grievance Procedure

The rule provides that the PHA must give each tenant in the PHA's public housing program a "general written description" of the nature and coverage of the administrative grievance procedure, including a description of the circumstances when the PHA must give the opportunity for an informal hearing, and how to request a hearing (§ 966.30(d)(1)). The text of the administrative grievance procedure must be made available for inspection and copying by any tenant (§ 966.30(d)(2)).

A legal aid office commends the requirement that a PHA must adopt a written grievance procedure, must provide the family a general written description of the procedure, and must make the procedure available for inspection by the family.

PHA comment states that the PHA should not be required to furnish every family a copy of the PHA administrative grievance procedure, or a general description of the grievance procedure. Furnishing the grievance procedure to every family is an administrative and financial burden. A copy of the procedure should only be given to a family in danger of adverse action, or in case of a formal hearing, or only at the time a unit is leased to the family. PHA comment states that posting on the PHA office bulletin board is sufficient notice of grievance requirements.

PHA comment reflects a misreading of the requirement to give the tenant a "general written description" of the PHA's grievance procedures. The rule does not require the PHA to give every public housing tenant a copy of the PHA "administrative grievance procedure", i.e., the full text of the grievance procedure adopted by the PHA, in advance of a concrete grievance or at any other time. Rather, the rule appropriately distinguishes between the types of information the tenant needs at different stages, so that the tenant can understand and invoke the right to a hearing under the PHA grievance procedure. Consequently, the rule distinguishes between three classes of communication by the PHA to the tenant about the administrative grievance procedure:

—A "general written description" of the grievance procedure (§ 966.30(d)(1)). The general description is given to every tenant in the PHA public housing program.

—The "administrative grievance procedure" adopted by the PHA (§ 966.30(d)(2)). The tenant can inspect or copy the procedure at any time.

—The "notice of proposed adverse action" which informs a particular tenant that the PHA intends to take specific adverse action affecting the tenant (§ 966.31(b)). The notice informs the tenant of the reasons for the proposed action. The notice also tells the tenant about the opportunity for a hearing, and tells the tenant how to request a hearing.

The "general description" gives the tenant a broad understanding of how the grievance process works, and when the tenant has the right to a grievance hearing. The description must be given to every tenant, even if there is no concrete dispute or expectation of dispute between the tenant and the PHA.

The general description should be drafted in clear and simple language. If the tenant wants more detailed information, the tenant can examine the PHA administrative grievance procedure. Under the rule, the individual PHA will be able to develop and use general description literature, such as a brief pamphlet or booklet, that briefly and effectively communicates to public housing tenants the basic elements of a tenant's right to a grievance hearing.

The requirement to distribute a general description to every tenant in the PHA public housing program poses a reasonable administrative burden for the PHA. The requirement is an important link in implementation of the PHA's grievance obligation under the 1983 law. Together with the tenant's right to full examination of the PHA grievance procedure, and the right to notice of specific adverse action respecting the tenant, the general description helps the tenant know how and when to exercise the right to a grievance hearing on PHA adverse action.

The rule does not require the PHA to give the general description to a tenant on repeated occasions, or at any particular time. The requirement is satisfied by giving the general description only one time, such as at the time a tenant is first admitted to the PHA's public housing program. The PHA could give the general description at the time of initial lease-up to a tenant, as recommended by PHA comment. The PHA does not have to repeat or supplement the general description first provided to a tenant, unless there are changes in the PHA's administrative procedure which change elements described in the original general description given to the tenant. For example, there could be a change in the procedure for requesting a hearing described in the original notice to the tenant. If so, the PHA must give the tenant general information on the PHA's currently operative procedure to request a hearing.

HUD expects that most PHAs will give a tenant the general description of the PHA grievance procedure at the time of some other regular communication by the PHA with the tenant. This practice minimizes the PHA's administrative burden. For example, the general description can be handed to a tenant when the tenant is admitted to the PHA public housing program, together with other orientation materials for new participants. For tenants already admitted to the PHA's public housing program, the general description can be give to each tenant at the annual reexamination (when the PHA must communicate with the tenant about family income and composition, and about the PHA's determination of the tenant rent).

Comment suggests that the tenant should be given a form for requesting a hearing at the time of annual reexamination. Comment remarks that the reasons for a hearing must be clearly defined, to prevent nuisance grievances.

The suggestion is not adopted. For easy administration of the grievance requirement, a PHA may elect to develop a form to be submitted by a tenant who wants a grievance hearing. The HUD regulations establish minimum requirements for the PHA administrative grievance procedure. The PHA will have broad authority to work out the details of the local grievance process. HUD will not mandate the use of grievance forms, and will not require that grievance forms be distributed at specified times.

3. Notice of Proposed Adverse Action

a. Requirement for Notice—Statute and Rule. Section 6(k)(1) of the U.S. Housing Act of 1937 provides that a tenant must "be advised of the specific grounds" of a proposed adverse action by the PHA (42 U.S.C. 1437d(k)(1)). Notice of the proposed action is also necessary to give the tenant an actual opportunity to request a hearing under the PHA grievance procedure.

The rule provides (§ 966.31(b)(1)):

> The PHA shall give the Tenant written notice of a proposed adverse action. The notice shall:
>
> (i) Contain a specific statement which describes the proposed adverse action, and the reasons for the proposed adverse action.
>
> (ii) State that the Tenant may request a hearing under the PHA's administrative grievance procedure.
>
> (iii) State how to request a hearing, and the deadline for requesting a hearing.

b. When PHA Gives Notice of Adverse Action—(1) Termination of Tenancy. The final rule adds new language providing that occupants may not be evicted until the PHA has given the tenant notice of proposed adverse action (new § 966.31(b)(2)(i)(A)) (unless eviction is excluded from the PHA grievance process). The rule also provides (§ 966.31(e)(1)(ii)):

> If the Tenant makes a timely request for a hearing on a proposed decision to terminate the tenancy or to evict the occupants * * * the occupants shall not be evicted from the dwelling unit before completion of the PHA grievance hearing.

If the PHA terminates the lease, the notice of adverse action must be given before or combined with the notice of lease termination (§ 966.31(b)(2)(i)(B)). This procedure is designed to allow time for a hearing within the period of the statutory notice of lease termination. The 1983 law provides that tenants must have an opportunity for a grievance hearing within the period of the applicable notice of lease termination (U.S. Housing Act of 1937, section 6(k)(2), 42 U.S.C. 1437d(k)(2)).

If a tenant is given notice of adverse action, and makes timely request for a grievance hearing, it is possible that the grievance hearing may not be completed before expiration of the notice of lease termination (e.g., fourteen days notice for non-payment of rent). The rule therefore provides (§ 966.31(e)(1)(i)):

> For a proposed termination of the lease by the PHA, or a proposed PHA decision not to renew the lease at the end of the lease term, the lease shall not terminate before completion of the PHA grievance hearing.

For a proposed decision to evict the family from the dwelling unit after the end of the lease term, the statute and rule do not specify any minimum period of notice (from service of the notice of adverse action to commencement of the eviction proceeding). However, a tenant who makes a timely request for a grievance hearing after receiving notice of adverse action may not be evicted before completion of the hearing (§ 966.31(e)(1)(ii)).

(2) Requiring Tenant to Move. A decision by the PHA to make the tenant transfer from one public housing unit to another is an adverse action. The rule provides (§ 966.31(b)(2)(ii)):

> * * * the Tenant may not be required to move until the PHA has given the Tenant notice of proposed adverse action. If the Tenant makes a timely request for a hearing on the proposed decision, the Tenant may not be required to move until Tenant is given the opportunity for a grievance hearing.

Comment notes that a tenant should not be required to move to another public housing unit until the PHA gives notice of adverse action, and until the grievance hearing is completed. Both of these elements were already included in the proposed rule. No revision is required.

Comment states that the PHA should be required to give notice to the family at least thirty days prior to move (with additional time for mailing). HUD finds no need to impose a special notice period for this purpose. If a tenant refuses to transfer to another unit, the PHA may terminate the lease on the original unit. If so, the PHA must give thirty days notice of the lease termination (for grounds other than health or safety or non-payment of rent) (§ 966.22(a)). The PHA must also give notice of this proposed adverse action to terminate the lease, and this notice must be given no later than service of the notice of lease termination (§ 966.31(b)(2)(i)(B) and § 966.22(d)(3)). The result is to effectively require notice of adverse action at least thirty days before termination of the lease. In addition, the rule provides that a tenant is not obligated to move until the tenant has the opportunity for a grievance hearing (§ 966.31(b)(2)(ii)).

To avoid delay, the PHA may give a combined notice of proposed adverse action: (1) Requiring the tenant to move to another dwelling unit, and (2) terminating the lease for this reason. The notice of adverse action may be combined with the thirty day notice of lease termination.

(3) Rent or Charges. A PHA determination of rent or PHA charges is an adverse action. The rule provides that the PHA may give notice of proposed adverse action when the PHA gives the tenant notice of a proposed decision determining rent or charges (§ 966.31(b)(2)(iii)).

The tenant may request a change in rent or charges determined by the PHA (see § 966.31(c)(1)). The rule provides that the PHA must give notice of adverse action no later than the time when the PHA denies the tenant's request for a change of the PHA's proposed determination of rent or charges (§ 966.31(b)(2)(iii).

(4) Other Adverse Action. Under the final rule, "adverse action" includes other specific, concrete and affirmative individualized action contrary to the interests of a tenant (§ 966.31(a)(2)(iv)). For such other adverse action, the final rule provides that the PHA must give notice of adverse action to the tenant at a time that gives the tenant the opportunity for a grievance hearing before the action is taken (§ 966.31(b)(2)(iv)).

C. Reasons for Adverse Action. The rule provides that the notice of adverse action must contain "a specific statement which describes * * * the reasons" for a proposed adverse action (§ 966.31(b)(1)(i)). The provision implements the requirement in the 1983 law that tenants must be advised of the "specific grounds" for a proposed adverse action (U.S. Housing Act of 1937, section 6(k)(1), 42 U.S.C. 1437d(k)(1)).

The provision in the final rule is substantively identical to the provision as proposed, but substitutes reference to "reasons" for proposed adverse action in place of the prior reference to "grounds" for such action. Although "grounds" is the statutory term, "reasons" is a more colloquial and less legalistic way of expressing the same idea. In addition, the change conforms with the regulation provisions concerning a notice of lease termination (stating "reasons" for lease termination); and concerning a hearing decision (stating "reasons" for the decision).

Comment recommends that the regulation require a fuller statement of the basis for adverse action. Comment states that the notice should include a statement of facts and the sources of facts, that the notice should state specific grounds for adverse action, and that the PHA notice should provide clear and precise notice to the tenant.

HUD has not made any change in response to such comment. The rule as promulgated requires that the notice of adverse action must contain a "specific statement" which describes the reasons for the proposed PHA action. A notice conforming to this standard affords clear and precise notice to the tenant, so that the tenant can decide whether to request a grievance hearing on the PHA adverse action. After receiving the notice, the tenant will know what was decided and why. In the grievance hearing, the tenant can effectively pursue redress of the grievance.

The notice of adverse action is not the sole source of information available to the tenant so that the tenant can prepare for a hearing. In most cases, the tenant had direct and personal knowledge of the matters to be decided at hearing, e.g., respecting family income or family conduct. In addition, the tenant has a right of access to relevant documents in the possession or control of the PHA § 966.32(d)). The notice of adverse action is a statement of the specific reasons for the proposed PHA determination. The notice gives the tenant sufficient information so that the tenant can—if tenant wishes—exercise the right to an informal grievance hearing before the PHA.

4. Procedure To Request Hearing

Comment states that the notice of adverse action should include a form for requesting the hearing. The PHA should be required to accept an oral request for hearing unless the PHA supplies a form to the tenant. HUD has not adopted these recommendations. There is no need for HUD to minutely dictate details of the local grievance process.

A requirement for the tenant to submit a grievance form or other written request to grieve may offer significant advantages for the PHA and the tenant. A requirement for some written submission, or for submission in a prescribed form, tends to minimize issues as to whether the tenant requested a grievance before the PHA deadline. A standard grievance form may help the tenant exercise the right to grieve. Use of a grievance form may also help the PHA, since grievance requests will be submitted in a common format, and my be easier to process. Some public housing tenants may not know how to fill out a grievance form. However, the tenant may be able to get assistance, for example from PHA counselors, tenant organizations or local legal aid.

A PHA can develop techniques for handling the grievance request. The PHA can best work out procedures to fit the local situation. There is no compelling reason to prescribe or prohibit a requirement for the tenant to request a hearing in writing, or on a form supplied by the PHA.

Comment states that the notice of adverse action should specify the PHA deadline, and the procedure for requesting a hearing. HUD agrees. The rule states that the notice must state "how to request a hearing, and the deadline for requesting a hearing" (§ 966.31(b)(1)(iii)). The tenant's opportunity to grieve is assured by requiring the PHA to first give the tenant a general description of the grievance process, and then a notice of adverse action that also tells the tenant how to request a hearing.

5. Deadline to Request Hearing

a. Statute and Rule—Authority to Establish Deadline. The 1983 law directs HUD to promulgate regulations which require each PHA to establish and implement an administrative grievance procedure which gives a tenant an opportunity for a grievance hearing "upon timely request" (U.S. Housing Act of 1937, section 6(k)(2), 42 U.S.C. 1437d(k)(2)). The PHA may set a deadline for the tenant to request a hearing. The PHA must grieve on a proposed adverse action if the tenant submits a "timely request" for a hearing. Conversely, the PHA has no statutory duty to grieve if the tenant does not submit a timely request.

The time for a tenant to submit the request for hearing is determined by the administrative grievance procedure adopted by the PHA in compliance with the statute. A tenant who misses the deadline for timely submission of a grievance request under the PHA grievance procedure loses the statutory right to grieve.

The rule provides (§ 966.31(c)(2)):

> (i) The PHA administrative grievance procedure may provide that the Tenant must request a hearing by a reasonable deadline as determined by the PHA.
>
> (ii) The PHA may establish different rules for determining the deadline for requesting a hearing in different circumstances, or for different types of grievance. The deadline for the Tenant to request a hearing shall be stated in the notice of proposed adverse action. The PHA administrative grievance procedure may provide that the PHA may grant a Tenant an exception from the deadline if the PHA determines that the exception is justified by individual circumstances.

b. Reason for Establishing Deadline. The proposed rule provided that the notice of adverse action must state how the family can request a hearing, and the "time by which" the request must be made. Comment objects to allowing the PHA to establish any maximum period (deadline) for a tenant to request a hearing in cases other than eviction. Comment claims that the PHA does not have a sufficient interest to justify establishing a deadline in non-eviction cases. Problems can be rectified through the grievance process. The establishment of strict deadlines forces the tenant into court for resolution of a grievance.

The PHA has a powerful management interest in having a right to define the time by which a tenant must exercise the right to grieve on an adverse action. For all types of adverse action, the fixing of a deadline to grieve means that the PHA knows when the right to grieve is exhausted, and the PHA can go forward with appropriate management action on that basis. Absent a deadline, legitimate PHA management actions and decisions may be interrupted or upset at any time by tenant's belated exercise of the opportunity to grieve. The PHA may be compelled to reverse or halt management actions in progress pending completion of the grievance hearing, or as a result of the grievance decision.

The point of the statutory opportunity to grieve is to give the tenant a fair chance to be heard on a proposed PHA decision, not to permit the tenant an open-ended right to seek a grievance hearing at the tenant's leisure. The statutory scheme explicitly contemplates that the PHA should only be required to grieve upon a "timely request" by the tenant. The statute thus recognizes the interest of the PHA and the public housing program in establishing a time limit for submission of a request to grieve.

When the PHA determines rent or charges, the PHA should be able to confront points of dispute when issues are fresh. Passage of time may also compound points at issue between the tenant and the PHA, for example, by adding subsequent disputes on non-payment (or other questions) to an original issue concerning computation of the tenant rent at reexamination. If the tenant does not timely exercise the right to grieve on the determination of rent at annual reexamination, the PHA may cut off the right to grieve on that subject. After expiration of the deadline to grieve on the PHA rent determination, the PHA knows that the tenant may not thereafter seek a grievance hearing on that issue. If the tenant fails to pay the redetermined rent, the PHA may terminate the tenancy for non-payment of rent, but is not obliged to grant an administrative grievance hearing on the PHA's determination or rent.

When the tenant is asked to transfer to another public housing unit, the PHA needs to know if the tenant is going to dispute the move. If the move is not disputed (i.e., the tenant does not submit a request for grievance by the deadline stated in the notice of adverse action) the PHA may proceed on the assumption that a new unit must be prepared and available for occupancy by the tenant, and that the tenant's original unit will be available for occupancy by another program family.

In the case of a grievance on the PHA's proposed termination of the lease, the law (U.S. Housing Act of 1937, section 6(k)(2)) provides that a tenant must be given the opportunity for a hearing upon "timely request [by the tenant] within any period applicable [for giving a notice of lease termination as required under the 1983 law (U.S. Housing Act of 1937, section 6(l)(3), 42 U.S.C. 1437d(l)(3)]". To assure this opportunity, the rule provides that the notice of adverse action must be served with or before the lease termination notice (§ 966.31(b)(2)(i)(B)). The PHA may establish a deadline for requesting a hearing on the PHA's proposed decision to terminate the lease and evict the family. After the deadline has run, the PHA can freely proceed with the eviction action.

The proposed rule provided that the notice of adverse action must state the "time by which" a family must request a hearing. The final rule refers instead to a "deadline" for requesting a hearing. This is merely an editorial change. The "deadline" is the "time by which" the tenant must submit the request—the end of the period during which the tenant can ask for a hearing.

A notice of adverse action states the deadline by which the tenant must request a hearing. A tenant loses the right to a hearing on the PHA determination of rent or charges if the tenant either (1) does not ask for a change in the determination before the deadline recited in PHA notice of the determination (§ 966.31(c)(1)); or (2) does not ask for a hearing by the deadline recited in a notice of adverse action (which states the grounds for the determination, and advises the tenant of the opportunity for a grievance hearing) (see § 966.31(c)(2)).

c. Setting Deadline. Comment contends that under the statute, the tenant may request a hearing at any time within the period of the lease termination notice. Under this reading of the 1983 law, the tenant may elect to request a hearing at the very end of the lease termination notice period. This reading of the law would pyramid the lease termination notice and the period needed to complete the grievance at the tenant's request, thus delaying the lease termination until both periods have run. For example, if the PHA is required to give a thirty day lease termination notice, the request to grieve is submitted on the last day of the thirty day period, and the grievance process consumes fifteen days, the period for lease termination is effectively extended to forty five days (thirty days plus fifteen days).

HUD does not agree with this reading of the statute. Under the language of the statute, the tenant request must be submitted "timely", as well as within the period of the lease termination notice. The requirement for "timely" submission of the grievance request is a separate element of the right to grieve pursuant to the 1983 law (and applies to grievances on any type of adverse action, not only a grievance relating to termination of the lease).

Comment objects that the rule does not set any minimum period for the tenant to ask for a hearing. Comment claims that a PHA can nullify the opportunity for a hearing by setting short and unrealistic time frames for requesting a grievance. The regulation should prohibit use of unreasonable limits. After receipt of the PHA notice, the tenant should have at least ten or fifteen days to request a grievance hearing. The rule should either specify minimum periods, or should establish a regulatory standard by which the PHA deadline can be measured.

HUD has not adopted the recommendation to set a specific minimum period for submission of the tenant grievance request. HUD has no basis to impose an arbitrary minimum period. Different PHAs may legitimately establish different deadlines. Each individual PHA is better able to weigh the consequences of different grievance request periods for the PHA and for the tenants. In the statute, the Congress elected to prescribe specific periods for the notice of lease termination (e.g., fourteen days for non-payment), but declined to prescribe a specific minimum time period for a tenant to submit the request for a hearing. The law posits only that the tenant request must be "timely". Similarly, the Department declines to impose specific minimum time periods in this rule.

HUD is concerned that the minimum ten or fifteen day request periods proposed in public comment could considerably distort and delay the process for eviction of a public housing tenant. For example, the Congress recognized that the PHA should have quick access to the courts where a tenant threatens health or safety of tenants or employees.

The Congress therefore provided that in such cases the lease termination notice may not be less than a "reasonable time". In these cases, the law does not define a fixed minimum period for termination of the lease. The fixed grievance request periods proposed by public comment are not consistent with the statutory requirement for "timely" request within the period of the lease termination notice. Moreover, the proposed request periods could considerably extend the time for eviction of these tenants, and thereby prolong the danger for tenants and employees.

In an eviction for non-payment of rent, delay in completion of the grievance hearing tends to delay the process for eviction of the tenant. In practice, the PHA may not be able to commence the judicial eviction action until expiration of a total period comprised of the period for tenant to request a grievance hearing, plus the period for determination of the grievance on the tenant's request. To facilitate prompt processing of evictions for non-payment of rent, in accordance with the statutory objective (U.S. Housing Act of 1937, section 6(c)(4)(B), 42 U.S.C. 1437(d)(4)(B)), the PHA should be able to establish an accelerated deadline for the tenant to submit a request for hearing.

The notice of adverse action informs the tenant that the PHA intends to take some action contrary to the tenant's interest, and how and when to ask for a hearing. After receiving the notice, a tenant does not need a long period to submit a simple request to grieve on a PHA action. There is no reason to believe that a uniform minimum period of ten days or fifteen days is more effective than a shorter period in assuring that the tenant has a practical opportunity to ask for a grievance hearing on PHA adverse action. We also remark here, as in other contexts, that a termination of the tenant's right to an administrative grievance hearing before the PHA does not mean that the tenant loses the chance for a hearing on the issue. If the PHA seeks eviction of the tenant, the tenant will have the opportunity for a due process hearing in State court.

In the final rule, HUD adopts the recommendation that the regulation should set a general standard governing establishment by a PHA of a deadline for the tenant to request a hearing, and that the regulation should not allow the use of unreasonable limits. The final rule adds a provision that the hearing must be requested by a "reasonable deadline as determined by the PHA" (§ 966.31(c)(2)(i)).

An individual PHA may have good reason to set different deadlines for different types of grievance. The rule therefore provides that "the PHA may establish different rules for determining the deadline for requesting a hearing in different circumstances, or for different types of grievance" (§ 966.31(c)(2)(ii)).

Under the language of the rule, the decision on how long a period to allow the tenant for requesting a hearing fundamentally rests in the sound administrative discretion of the PHA. The reasonableness of the deadline is "determined by the PHA". The language of the rule is not intended as an invitation for courts to freely second-guess the PHA on what deadlines are reasonable. The PHA is in the best position to balance the administrative and program consequences of different deadlines, as against the tenant interest in securing a grievance hearing on proposed adverse action. Under common State standards for judicial review of agency action, the PHA determination of an appropriate request deadline should stand unless the determination is arbitrary and capricious, i.e., there is no reasonable basis for the determination.

d. *PHA Grant of Exceptions to Deadline.* Comment states that the PHA should have authority to grant good cause exceptions where a tenant fails to request a hearing by the PHA deadline, or that the PHA should be required to approve deadline exceptions for good cause. The final rule permits the PHA to grant an exception from the deadline "if the PHA determines that the exception is justified by individual circumstances" (§ 966.31(c)(2)(ii)). However, the rule does not require the PHA to grant exceptions.

The general decision to provide for good cause exceptions in the PHA grievance process, as well as the decision to grant or deny an exception in a particular case, should rest in the administrative judgment of the PHA. The authority for grant of exceptions (to the PHA's generally applicable deadline for requesting a hearing) affords the PHA leeway to respond to special circumstances in individual cases. The rule allows the PHA flexibility to respond to special problems not accounted for in determination of the PHA deadline policy.

The Department does not find sufficient reason to direct the grant of deadline exceptions in the PHA grievance process. A PHA may properly judge that the benefits that may flow from allowing exceptions in special cases do not outweigh the benefits of a policy that flatly denies access to the grievance process for a tenant who misses the grievance deadline.

First, if a PHA elects to allow exceptions, the PHA partially forgoes the advantages of imposing a grievance deadline. The PHA loses the administrative certainty that the grievance process is past once the deadline is past. The PHA therefore loses the ability to take appropriate action on this basis. The PHA's uncertainty on the outcome of a grievance request is extended while the PHA is deciding whether to grant an exception. If an exception is granted, the uncertainty is further extended through completion of the grievance hearing. In contrast, if the PHA decides to deny grant of any deadline exceptions, the PHA knows the grievance process is over as soon as the deadline has expired.

Second, the PHA may properly consider the administrative burden of processing requests for exception—with the need to sift through individual exception requests to determine if there is good cause for exception. Processing of exception requests burdens the PHA with the need to determine that individual requests are bona fide, and are based on grounds which justify an exception. By deciding to allow exceptions, the PHA is necessarily exposed to the administrative burdens of the process for grant of exceptions, as well as the burden of carrying forward the hearing process if the exception is granted. The PHA may lack, or believe that it lacks, ability to readily distinguish between good faith claims for exception, and specious excuses for missing the deadline.

Third, opening the door to PHA consideration of requests for exception on behalf of tenants who miss the deadline may diminish the pressure for tenants to comply with the deadline.

In short, a PHA may have good and sufficient reason to establish a flat deadline for requesting a hearing under the PHA grievance process, without allowing any exception.

6. Elements of Hearing

a. Person Conducting Hearing—(1) Selection of Hearing Officer—Statute and Rule. Section 6(k)(2) of the U.S. Housing Act of 1937 provides that the hearing on a proposed PHA adverse action must be held "before an impartial party" (42 U.S.C. 1437d(k)(2)).

The rule (§ 966.32(a)) states that:

> (1) A hearing under the PHA's administrative grievance procedure shall be conducted by a person or persons (who may be an employee or officer of the PHA) designated by the PHA in the manner required under the PHA's grievance procedure.
>
> (2) The hearing officer shall be someone other than the person who made or approved the decision for the proposed adverse action under review or a subordinate of such person.

(2) Designation of PHA Officer or Employee As Hearing Officer. PHA comment broadly supports the hearing procedures. Comment approves the PHA's broad authority to designate a hearing officer, and to appoint an officer or employee of the PHA. The PHA may designate a hearing officer who has knowledge and experience of the PHA and the public housing program. Comment notes that this background will help a hearing officer arrive at a solid, responsible and impartial decision.

The Department believes that the PHA should have wide discretion to appoint as hearing officer a person with knowledge of the program, and of technical program requirements and procedures (such as technical procedures for determination of the tenant rent in accordance with the U.S. Housing Act of 1937 and HUD rules). The Department has stated that:

> this familiarity can assist in a more rapid, more economical and more accurate determination on the points at issue. The PHA hearing process should be able to benefit from the experience of the hearing officer, especially knowledge concerning program requirements and procedures. (49 FR 12229, March 29, 1984.)

The rule prohibits use of a hearing officer participated in ("made or approved") the challenged decision, or a subordinate of that person. By prohibiting use of a subordinate of the original decision-maker, HUD seeks to assure that the hearing officer is not subject to the pressures of a superior, and to thus enhance the independence and objectivity of the hearing process. The rule specifies that a person who "approved" the original decision may not conduct the informal hearing.

Legal aid comment asserts that the authority of the PHA to designate a hearing officer is too broad. Comment especially objects to appointing an officer or employee of the PHA as the hearing officer. Comment claims that a PHA officer or employee is not impartial and disinterested. A tenant will see the grievance hearing as a kangaroo court. Comment objects to permitting the PHA to use a hearing officer who is a *superior* of the decision-maker, or is a *co-worker* or *peer* of the decision-maker.

HUD has not revised the proposed provisions on designation of the hearing officer. In the context of the administrative grievance process for the public housing program, the standards stated in the proposed rule are a sufficient guarantee of impartiality.

The purpose of the grievance hearing is to give the tenant a chance for a review of the PHA decision, to see if the PHA has violated an applicable law or rule. In the administrative hearing, the tenant gets the benefit of a second look at the challenged decision, by someone other than a person who made or approved the original decision.

Since the hearing officer—including a superior, peer or co-worker of the decision-maker—did not make or approve the original decision challenged in the grievance hearing—the review is not prejudiced by the mind-set of the original decision-maker. Through this review, PHA error can be uncovered and rectified.

In objecting to the authority for the PHA to use a superior of the decision-maker as the hearing officer, legal aid comment suggests that a grievance may arise from application of a faulty *policy* by the decision maker. The hearing officer may be the person who promulgated the PHA policy. If the policy is flawed, the person who implemented the policy cannot be an independent hearing officer.

In response, several points should be remarked:

—The purpose of a grievance hearing is to decide whether the PHA has violated some law or rule. The grievance hearing is not a forum for consideration of general policy issues or class grievances (for reasons discussed elsewhere in this Preamble. See section V.D.2.a). The question whether the PHA policy is or is not "faulty" is not at issue in the grievance hearing.

—If a tenant challenges the application of a policy to the tenant (i.e., whether the application of the policy violates some law or rule), a person involved in original issuance of the policy may properly consider whether the policy has been properly carried out with regard to the tenant. Indeed, there may be considerable advantage in using as hearing officer a person who has direct and intimate knowledge of the policy.

The 1983 law provides that a statutory grievance hearing must be conducted "before an *impartial* party". A hearing officer who is an officer or employee of the PHA, or who is a superior, peer of co-worker of the decision-maker, is able to provide an impartial second look at the challenged decision. In *Lopez v. Phipps Plaza* (498 F.2d 937, 943 (2d Cir. 1974)) (rejecting due process objection to appointment of hearing officer in subsidized housing), the opinion by Judge Friendly notes that a housing authority official does not lack impartiality simply because he is an officer of the housing authority. The opinion states that:

> As the hearing requirement is imposed on more and more agencies * * *, there will be greater and greater necessity for entrusting decision to agency personnel * * * * Moreover, confiding the [hearing] decision * * * to a person with experience in the management of housing projects has positive factors * * * *

In *Lopez*, the court also notes approvingly that under prior public housing grievance procedures there are no specific restrictions on who the PHA may appoint as an "impartial hearing officer" (498 F.2d at 944 n. 5).

In considering the elements of a due process administrative hearing, the Supreme Court has concluded that an agency official is not barred from acting as impartial hearing officer, so long as the hearing officer has not "participated in making the determination under review" (*Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S. Ct. 1011, 1022 (1970)). This rule prohibits the designation of a hearing officer who participated in ("made or approved") the challenged decision.

Comment asks that the rule be revised to make sure that the hearing officer has no *ex parte* contacts with PHA officials. HUD sees no need for a provision barring contacts with PHA officials. The PHA should have flexibility in structuring the administrative grievance process. PHA discretion should not be constricted by unnecessary or over-detailed Federal rules; or by rules modelled on judicial procedures. There should be room for adoption of hearing procedures which allow considerable informality in conduct of the hearing, or which allow a PHA to organize a hearing process in unconventional ways—for example, with authority for the hearing officer to actively investigate the facts, and question persons, including PHA employees or officials, who may have knowledge of the facts.

Of course, the PHA's hearing procedure, and the actions of a hearing officer under the procedure, must be consistent with the purpose of the hearing process—to provide the tenant with the opportunity for a fair hearing on grievable issues. The hearing officer may not collude with the PHA to deny the tenant a real "opportunity for an informal hearing", as required by the law and the rule § 966.31(a)(1)).

(3) Elimination of Requirements For Use of Hearing Panel and For Tenant Participation In Selection. Under the old lease and grievance rule, the PHA and the tenant participate on equal terms in selection of a hearing officer or hearing panel. Under the new rule, the hearing is conducted by a "person or persons" selected by the PHA (§ 966.32(a)(1)). The PHA decides whether to use a panel or single hearing officer.

Legal aid comment objects to eliminating the old rule requirement to use a hearing panel (unless the tenant and PHA agree on appointment of a single hearing officer). Comment also objects to eliminating the requirement for the tenant to participate in selecting the officer. Comment claims that tenant participation insures impartiality.

PHA comment favors permitting the PHA to designate the hearing officer, and the related authority to appoint a PHA employee or official as the hearing officer. PHA comment points out practical problems in administration of the old system. There are problems finding citizens to serve as hearing officers. The old rule does not provide a mechanism to appoint a grievance officer when local volunteers cannot be found. PHA comment notes that with elimination of the panel requirement hearings can be conducted more expeditiously. Under the old rule, hearing panel selection can take weeks.

The procedure for selection of hearing officers under the old rule is expensive, cumbersome and slow. The old procedure is structured in a way that gives opportunities for the tenant to hamstring the hearing process, by refusing to cooperate in expeditious appointment of panel members (allowing, for example, the tenant or tenant counsel to delay the point at which the PHA can commence judicial action to evict a tenant for non-payment of rent). In HUD's view, there is no justification for retention of the unsatisfactory system under the old rule.

(4) Authority of Hearing Officer. To operate a practical and orderly hearing machinery, the hearing officer must have authority to regulate the conduct of the hearing, including determinations on the relevance of proof that may be offered, and of the manner in which evidence is presented. The rule therefore states (§ 966.32(c)):

"The hearing officer may regulate the conduct of the administrative grievance hearing in accordance with the PHA's administrative grievance procedure."

b. Right of Tenant to Examine Relevant PHA Materials—(1) Statute and Regulation. Section 6(k)(3) of the U.S. Housing Act of 1937 provides that in an administrative grievance hearing on proposed PHA adverse action the tenant must "have an opportunity to examine any documents or records of regulations related to the proposed [adverse] action" (42 U.S.C. 1437d(k)(3)).

The final rule provides (§ 966.32(d)):

> The Tenant shall be permitted to examine and copy any relevant non-privileged documents in the possession or control of the PHA, including records or regulations. This opportunity shall be given at a time that will give the Tenant a reasonable opportunity to make use of the information in the grievance proceeding. If the PHA fails to produce documents timely, in response to the Tenant's request for examination, the hearing officer may prohibit the PHA from using the documents at the hearing.

(2) When PHA Must Produce Documents. Some comment endorses proposed provisions requiring the PHA to make relevant documents available for examination by the tenant. Other comment recommends that the PHA should be required to produce documents before hearing, so that the tenant can make effective use of documents produced by the PHA. Comment states that the regulation should specify a minimum period of access by the tenant before the grievance hearing (such as 5 days).

Comment which recommends that HUD require the PHA to produce documents prior to the "hearing" are not adopted in the final rule. The rule does not regulate in detail the procedure for making the information available to the tenant. The proposed rule also does not assume a clear and neat distinction between a pre-hearing "discovery" phase, and the "hearing" proper. The informal hearing may unfold as a meeting, or a series of informal meetings or exchanges, between the parties and the hearing officer. The PHA will possess considerable discretion to determine the incidents of the hearing process, so long as the process is consistent with the minimum elements defined in the statute and the rule. In addition, the hearing officer has a broad authority to decide issues concerning the production of documents.

Given the variable character of the local hearing process, and of the particular matters to be examined, the rule does not specify the point of the hearing process at which information in the hands of the PHA must be furnished to the tenant. Rather, the rule focuses on a practical question—whether the information is given at a time that provides a "reasonable opportunity" to make use of the information for purposes of the hearing.

Comment which urges that the PHA should have to produce the documents in advance of the hearing" assume that the hearing process is structured with a clear distinction between a pre-hearing phase, and the hearing itself. This position is implicitly modelled on the conventional judicial process for trial of a lawsuit, where there is characteristically a clear distinction between the pre-trial discovery phase and the trial.

The 1983 law does not dictate that the PHA administrative grievance hearing must be so structured. The PHA should be allowed to structure a grievance process which conforms with the minimum elements prescribed in the 1983 law, and which reflects the judgment and management discretion of the PHA. The grievance process should not be rigidly cast in the mold of a judicial trial, with a requirement for pre-hearing discovery. The tenant has a statutory right to "some kind of hearing" (see generally Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975)), so that the grievance can be fairly considered by the hearing officer. The tenant does not have a right or need for a hearing process patterned on a judicial trial.

The purpose of the tenant's right to examine PHA documents is to allow the tenant to use the documents for purposes of the hearing, such as to show the hearing officer that the tenant's rent is not rightly computed; or to show the hearing officer that the PHA does not have grounds to terminate the tenancy. This objective is wholly protected by providing that the tenant must have a "reasonable opportunity" to use the information in the proceeding. Of course, the PHA and the tenant may dispute, in a particular instance, whether the tenant has or has not had a reasonable opportunity for examination of the document for use in the hearing proceeding. The PHA and tenant may also dispute the proper cure for the problem—e.g., by a delay in the proceedings so that the tenant has more time for preparation. These issues may be decided by the hearing officer.

Comment states that the PHA should be prohibited from relying on documents not produced by the PHA for examination by the tenant. HUD agrees that a PHA which fails to make discovery of documents should be subject to appropriate remedy, including the possibility that the PHA may be precluded from using the documents in the hearing. The nature of the remedy should be decided by the hearing officer, in light of the particular circumstances and the requirements of the PHA administrative grievance procedure. The rule should not prohibit PHA use of the documents across the board, in all cases. The existence or degree of PHA fault, the harm to the tenant, and the most appropriate cure for the failure, will differ in different cases. In some cases, the PHA failure to produce a document may be inadvertent and innocuous. In other cases, the failure may proceed from deliberate concealment by the PHA, and may severely hinder the tenant's presentation of the grievance. The final rule adds a new provision that if the PHA fails to produce documents timely, in response to the tenant's request for examination, the hearing officer may prohibit the PHA from using the documents at the hearing.

(3) Possession or Control of Documents. The proposed rule required the PHA to produce relevant documents "in the possession of the PHA". Comment states that the rule should require the PHA to discover documents *under control of* the PHA. This provision would guard against the possibility of a PHA evading production of documents by transferring the documents to another party, such as the PHA attorney.

The final rule provides that the PHA must produce documents which are "in the possession *or control*" of the PHA.

(4) Relevance of Documents; Privileged Documents. Comment objects to giving the tenant a right of access to "any" relevant material, and notes that the rule does not say who determines "relevance". The tenant should not be allowed to "rummage at random" through PHA documents, which may violate the privacy and confidentiality of tenant records. Comment recommends revising the rule to provide that the PHA has an absolute right to refuse access to confidential files.

Under the rule, the tenant has no right to "rummage at random", only a right to examine relevant documents. If there is a dispute on relevance of documents demanded, the hearing officer may decide the relevance of documents sought by the tenant. The PHA may establish procedures needed to safeguard privacy and confidentiality of tenant records.

The final rule clarifies that the tenant does not have a right to examine PHA documents which are privileged. The PHA must give the tenant the opportunity to examine any relevant "non-privileged" documents. The rule does not disturb the PHA's right to deny production of privileged documents in accordance with State law, for example a State-created right to withhold documents subject to attorney client privilege. At the same time, however, the rule does not establish any Federal privilege against production, or any rules governing the circumstances in which a privilege arises. Rather, the rule defers to State law determining the existence or non-existence of privilege, and therefore to State policy underlying the grant or denial of a privilege. The tenant's Federal right to examine PHA documents related to proposed adverse action does not sweep aside State-law privileges against production of documents.

c. Evidence—(1). Statute and Rule. Section 6(k)(5) of the U.S. Housing Act of 1937 provides that in a hearing on proposed adverse action the tenant will "be entitled to ask questions of witnesses and have others make statements on his behalf" (42 U.S.C. 1437d(k)(5)).

The final rule provides (§ 966.32(e)):

> (1) The Tenant and the PHA may present evidence, and may question any witnesses. The Tenant and the PHA may have others make statements at the hearing.
>
> (2) Evidence may be considered without regard to admissibility under the rules of evidence which apply in judicial proceedings."

(2) Acceptability of Evidence. In receiving and weighing evidence offered by the parties, the hearing officer is not bound by the rules of evidence which apply in a court (§ 966.32(e)(2)). The formal rules of evidence in a judicial proceeding are not suitable for the informal grievance hearings required under this rule.

Comment states that the rule should prohibit use hearsay evidence, or use of hearsay as the "primary" evidence. The PHA may try to establish a case at hearing by written declaration, or other hearsay testimony, thus avoiding cross-examination of witnesses. The PHA and the tenant should be required to produce any witnesses on whose statements they propose to rely. Comment also claims that lack of standards on acceptability of hearsay evidence is an invitation to untested innuendo.

The final rule does not prohibit use of "hearsay" evidence, or add any additional rules on admissibility of evidence. Public comment does not demonstrate a need to complicate PHA administration of the grievance process by imposing technical rules of evidence. The HUD regulation should not import into the informal grievance hearing the arcane and artificial complexities of the evidentiary rules applied in a court trial, or even a simplified version of those rules. When applied in the administrative grievance process, a broad hearsay prohibition may force the rejection of valid and probative evidence of the truth.

The use of more complicated hearing rules, including technical restrictions on the reception and use of certain types of evidence, would tend to force PHAs to use hearing officers who are able to understand and work with the rules. Imposition of complicated evidentiary and other procedural requirements tends to promote PHA employment of lawyers and other law-trained professionals as hearing officers. The national public housing grievance requirements should be stated as simply as possible, to permit the broadest freedom to choose lay hearing officers, including tenants, PHA employees, or other persons drawn from the community. Persons who are not expert in the law are well able to serve as administrative hearing officers, so long as HUD does not burden the informal hearing process with unneeded technical requirements.

The purpose of the hearing on any question of fact is to determine the truth respecting the question at issue. A prohibition against use of technical "hearsay" may prevent the use of valuable evidence which could properly inform the decision of the hearing officer. In the context of an administrative grievance proceeding, the use of evidence other than direct testimony by a witness to the events or facts at issue may properly influence the judgment of the hearing officer on the weight or significance of the evidence.

In deciding to admit and consider a written declaration or other "hearsay" as evidence on some issue of fact, the hearing officer may discount the probative value of evidence as to which the parties or the hearing officer have not had the opportunity to cross-examine the witness in the course of the hearing. The hearing officer may refuse to receive hearsay evidence, or may decline to believe the evidence received. The decision of the hearing officer should be based on good judgment and common sense as to the force of the information offered in proof. As a matter of local choice, the PHA administrative grievance procedure may restrict or regulate use of hearsay in the local grievance process. However, HUD should not nationally impose this restriction on the local grievance process.

(3) Use of Statements. The statute requires, and the rule correspondingly provides, that the tenant may "have others make *statements*" on behalf of the tenant (U.S. Housing Act of 1937, section 6(k)(5), 42 U.S.C. 1437d(k)(5); § 966.32(e)(1)). The statute and rule also provide that the tenant is entitled to representation by a person of his choice. (U.S. Housing Act of 1937, section 6(k)(4), 42 U.S.C. 1437d(k)(4); § 966.32(b); see section V.E.6.d of this Preamble.)

The rule separately states that the tenant (as well as the PHA) "may present evidence, and may question any witnesses" (§ 966.32(e))1)).

Comment expresses concern that the rule language on use of tenant "statements" is not clear. Comment asks if the language means that the tenant may submit written statements by persons not present at the hearing, or only means that the tenant has a right to have people appear and testify for the tenant. If the tenant has a right to submit written statements, the PHA should have the same right. Comment asks clarification that the PHA has a right to question tenant statements, and the people who make the statements.

The statutory authority for a tenant to have "others" make "statements" on behalf of the tenant does not explicitly distinguish between statements offered as proof of some fact, i.e., as evidence, or other statements offered in support of the tenant's position, e.g., as argument or discussion. In this rule, HUD finds no present need to distinguish between these possible applications of the statutory requirement. Rather the rule broadly allows the submission of "statements"—whether or not offered as evidence of a fact. Where the statement is in the nature of evidence, the right to have "others" make "statements" overlaps the regulatory right to present "evidence" supporting the position of the tenant. Where the statement is in the nature of argument, the right to make statements partially overlaps the right of the tenant to have representation chosen by the tenant.

The final rule is revised to provide that the right to submit "statements"—like the right to present evidence at the hearing—applies symmetrically to both the PHA and the tenant (§ 966.32(e)(1)). The PHA should have an equal right to present its position at the hearing, both in presentation of evidence, and in presentation of arguments that support the position of the PHA.

Comment on the tenant's right to submit written statements, and on the right of the PHA to question persons who make statements, fundamentally raises the same issue treated above in the discussion of "hearsay" evidence. The administrative grievance procedure adopted by a PHA may regulate the use of statements (for the tenant or for the PHA) by persons not present at the hearing. Insofar as statements are offered as evidence, here too there is no need for HUD to establish rules on the treatment of evidence by declaration of persons who are not present at the hearing, and thus are not available to be questioned by the parties.

(4) Basis of Decision. The rule provides (§ 966.33(a)) that "factual determinations [by the hearing officer] concerning the individual circumstances of the Tenant and Household shall be based on evidence presented at the hearing". The rule does not prohibit the hearing officer from making use of knowledge about the project or about program requirements and procedures.

Comment objects to allowing the hearing officer to base a hearing decision on the officer's general information, or otherwise on facts not presented at the hearing, and which are not included in the hearing record. (This concern was expressed by public comment on the December 1982 proposed rule, as well as the July 1986 proposed rule.) Comment states that allowing the hearing officer to rely on prior information makes a mockery of the hearing. The tenant is not able to confront and cross-examine witnesses. The hearing decision should be solely based on evidence presented at the hearing.

HUD believes that the PHA hearing process should be able to benefit from the experience of the hearing officer. Indeed the ability to select hearing officers with relevant knowledge about the project and program is one of the important advantages of using the informal administrative grievance procedure instead of the courts.

For the types of issues most often raised in a public housing grievance hearing, the special knowledge of the hearing officer may be of great help in reaching a decision which is accurate, fair and fast. PHA management and hearing resources are not wasted by the need to prove common points at each successive individual hearing before the same hearing officer. For example, grievance hearings often involve the question whether a tenant's rent was correctly computed under HUD regulations and procedures. The hearing officer may develop some expertise in HUD regulations and procedures for these computations.

The PHA is not required to obtain for each new hearing a hearing officer who is innocent of relevant general program knowledge. If the officer possesses general program knowledge relevant to the issue at hearing, the officer should not pretend, in each new hearing, that points of general information are novel and must be demonstrated anew (by receiving in evidence the same HUD regulations and procedures, or by hearing the same testimony by the same witnesses).

Allowing the hearing officer to rely on prior general or program knowledge and experience does not, as implied by comment, intrinsically bias the hearing in favor of the PHA. The use of a hearing officer with better general knowledge or expertise will tend to produce better decisions—decisions based on a correct understanding of the relation between the individual circumstances of the tenant (shown by evidence presented at the hearing) and general program requirements or circumstances. If the hearing officer is knowledgeable, the hearing officer may be better able to penetrate PHA mistakes in applying technical procedures, may be less likely to defer to the PHA's assumed expertise. In addition, permitting reliance on the officer's prior general knowledge dose not preclude the tenant or the PHA from presenting witnesses or documentary evidence on any point at issue, e.g., to challenge the PHA's construction of HUD requirements as applied to the individual tenant.

Allowing the hearing officer to make use of general program information not presented at the hearing is supported by the legislative history of the grievance hearing requirement under section 6(k) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(k)). The bill reported by the House Banking Committee would have required a PHA to establish an administrative grievance procedure that would provide tenants an opportunity to be heard "in accordance with the basic safeguards of due process" (Report 98-123 on H.R. 1, P. 175). The bill did not state the list of administrative hearing requirements contained in the law as finally enacted. However, in reporting out the bill, the Housing Banking Committee stated a list of elements which must be included in the PHA hearing process under the bill (Report 98–123 on H.R. 1, p. 36), which is generally similar to the list of administrative hearing requirements in the law as passed by the Congress. The hearing requirements listed in the Report of the House Committee included "a decision *based solely on the record* and explained in writing". The requirement of a decision "based solely on the record" was deleted in the final legislation. This legislative history supports the conclusion that in reaching a decision the hearing officer may use general information already known to the hearing officer, and not contained in the record of the proceeding.

Comment challenges HUD's reading of the legislative history. The comment claims that if the Congress intended a break from past practice under the HUD lease and grievance requirements the Congress *would have said so* explicitly. This comment does not support a change in HUD's analysis of the law and legislative history. The duty of the Department is to carry out the law actually enacted by the Congress, not to imagine what the Congress would have or should have done, or to invent supposed statutory restrictions not stated in the law.

In reading the legislative history, HUD properly points to the fact that the text of the law actually passed by the Congress does not include the requirement for a decision exclusively based on the record, although this element was explicitly considered and mentioned by the House committee. The regulation here promulgated is a fair implementation of the statutory hearing requirements finally passed by the Congress, and contained in the law presented for signature by the President.

Comment expresses concern that the tenant will not have a chance to correct inaccurate information (based on prior information of the hearing officer). Comment states that if a hearing officer has prior knowledge of program policies and procedures, the officer should indicate an intention to take administrative notice of the facts, and give the parties an opportunity to dispute the facts during the hearing.

The final rule does not require the hearing officer to give advance notice of intention to take notice of non-record facts. Under the rule, the hearing officer has ample authority and opportunity to inform the parties that the hearing officer may rely on general information not included in the hearing record, and to give an opportunity for the parties to dispute assumptions or information of the hearing officer. The value of this procedure depends on the particular facts and issues which are subject to the grievance hearing, and should be left to the sound judgment and discretion of the hearing officer in each informal hearing. HUD sees no sufficient reason to universally impose on the PHA grievance hearing a cumbersome two-step process in which the hearing officer must in all cases first announce that the decision may include non-record elements (followed by the opportunity to offer evidence on these elements), in addition to issuing a final written decision stating the basis for the decision of the hearing officer.

d. *Representation of Tenant.* Section 6(k)(4) of the U.S. Housing Act of 1937 provides that in a hearing on proposed PHA adverse action the tenant is "entitled to be represented by another person of his choice at any hearing" (42 U.S.C. 1437d(k)(4)). The rule (§ 966.32(b)) provides that "at its own expense, the Tenant may be represented at the hearing by a person of the Tenant's choice."

e. *Promptness of Hearing.* When a hearing is required, the PHA must proceed with the hearing "in a reasonably expeditious manner and in accordance with the PHA's administrative grievance procedure" (§ 966.32(f)).

The final rule eliminates superfluous language stating that the expeditious hearing requirement applies in cases where a grievance hearing is required under the rule. All of the hearing procedures apply to a grievance hearing required under the rule.

f. Fees or Costs for Hearing. Comment recommends that the rule prohibiting the PHA from requiring a tenant to pay any costs of the grievance hearing, or to pay a fee of the hearing officer. This proposal is adopted.

The final rule provides § 966.31(f)):

> *Prohibition of hearing fees.* The PHA may not require a Tenant to pay any hearing fees or hearing costs as a condition for providing the Tenant the opportunity for an administrative grievance hearing under the PHA grievance procedure, and may not impose any hearing fees or hearing costs on the Tenant. (However, the PHA may require the payment of Tenant Rent as a condition for a hearing concerning Tenant Rent in accordance with §966.31(d).)

The prohibition of hearing fees or costs helps to preserve the practical ability of tenants to be heard in the statutory grievance process. Imposition of hearing fees or costs may discourage tenants from raising proper grievances which are cognizable in the administrative grievance process. By definition, families participating in the program are poor. A tenant may be reluctant to ask for a grievance hearing because the tenant fears exposure to possible hearing fees.

Unlike rent owed by a participant tenant, hearing fees or costs are not items the tenant is obligated to pay in the absence of a hearing. In addition, unlike back rents, possible hearing fees are not a major potential source of PHA income.

7. Hearing Decision

a. Informing Tenant of Decision. Section 6(k)(6) of the U.S. Housing Act of 1937 requires that in a hearing on proposed PHA adverse action the tenant is "entitled to receive a written decision by the public housing agency on the proposed [adverse] action" (42 U.S.C. 1437d(k)(6)). The rule provides § 966.33(a)):

> The hearing officer shall issue a written decision which states the basic reasons for the decision * * * A copy of the hearing decision shall be furnished promptly to the Tenant.

> (For discussion of the evidentiary basis of a determination concerning individual tenant circumstances, see section V.E.6.c.(4) of Preamble)

The Preamble to the July 1986 proposed rule notes that:

> the statement of decision * * * tells the family what was decided, and the reasons for the decision. It is intended that the written statement of decision must be truly informative as to the reasons for the decision. A bare and conclusory statement of the hearing decision, that does not let the family know the basic reasons for the decision, would not satisfy the decision requirement under the proposed rule. (51 FR at 26520)

PHA comment approves the provision of the proposed rule on the form of a hearing decision.

Other comment argues that a regulatory requirement to state "basic reasons" for the grievance decision is not adequate. The decision requirement should be expanded or clarified. Comment states that a tenant should get notice of "specific" reasons for decision. The decision should set out the factual basis for the determination. Comment states that the regulation text should incorporate the HUD interpretation (in Preamble to the July 1986 proposed rule) that a decision must include a "truly informative" statement of the basic reasons for decision.

The language of the proposed rule is not changed. A simple requirement to state "basic reasons" for the decision fully carries out the purpose of the written decision.

First, because the hearing officer must write and issue a decision, the officer is compelled to consider and articulate the basic reasons for the decision. Thus the officer is more likely to issue a decision properly based on the facts and the law at issue in the grievance hearing.

Second, the authority of PHA administrative process, and of the hearing decision on the tenant's challenge to PHA adverse action, is enhanced if a tenant is presented with the basic reasons for the hearing decision, rather than a bare statement of the hearing result. Whether or not a tenant agrees with the particular decision, the tenant and other families are more likely to accept the decision as a legitimate product of a legitimate process.

It does not follow, however, that a more extensive or more legalistic statement of decision will improve the quality of decision, or the degree of tenant satisfaction and acceptance. A more demanding statement of the decision requirement may be harder to write, harder to understand and harder to administer.

HUD also finds not need to incorporate in text of the rule the explanatory language in the Preamble of the proposed rule (which asserts that the statement of decision must be truly informative, and may not be limited to a bare and conclusory statement of the hearing decision). The Preamble language does not add any additional substantive requirement, but merely spells out the implications of the requirement to give "basic reasons" for the hearing decision.

HUD recognizes that questions will arise as to what is a sufficient statement of "basic reasons" in a concrete case. Such issues naturally arise in application of any regulatory standard, and will not be avoided by a more verbose statement of the rule.

b. Effect of Decision on PHA or Tenant—(1) When PHA Is Not Bound By Decision—*(a) PHA Determination.* The rule states circumstances in which the PHA is not bound by a decision of the hearing officer (§966.33(b)):

> The PHA is not bound by a hearing decision if:
>
> (1) The decision concerns a matter for which an administrative grievance hearing is not required * * * or otherwise in excess of the authority of the hearing officer, or
>
> (2) The decision is contrary to HUD regulations or requirements, or otherwise contrary to Federal, State or local law.

The rule also provides (§ 966.33(c)) that:

> If the PHA determines that it is not bound by the decision of the hearing officer, the PHA shall promptly notify the Tenant in writing of the determination, and of the reasons for the determination.

Legal aid comment objects to giving the PHA power to determine that the PHA is not bound by decision of a hearing officer in the grievance process. Comment objects to authorizing the PHA to repudiate a decision which exceeds the authority of the hearing officer. The PHA should be bound by the hearing decision unless the decision is contrary to law.

Comment asserts that the hearing process is useless if a PHA can unilaterally reject the hearing decision. Comment suggests that the decision that a grievance determination is contrary to law, and is therefore not binding, must be made by an impartial party, and may not be made by the PHA.

PHA comment welcomes the provisions authorizing a PHA to determine that the PHA is not bound by a hearing decision. Comment notes that clarification of this issue is overdue.

The final rule does not change the proposed provisions which define when the PHA is not bound by the grievance decision. These provisions are important to insure that the hearing officer operates within the role assigned by the PHA grievance procedure under this rule, and to specify that the PHA is not bound by illegal decisions.

The purpose of the hearing process is to give the tenant the opportunity for a fair hearing—to ascertain whether a proposed adverse action by the PHA is in accordance with law, HUD regulations or PHA rules. It is the proper function of the hearing officer to decide the propriety of the PHA's proposed adverse action under the grievance scheme established by the 1983 Federal law (section 6(k) of the U.S. Housing Act of 1937, 42 U.S.C. 1437(k)), the HUD rule which implements the law, and the administrative grievance procedure adopted by the PHA under the rule.

The charge of the grievance officer is to determine the grievance assigned for the officer's decision in accordance with this scheme. The PHA should not be bound by a decision that strays from this charge, or which otherwise invades the sphere entrusted to administrative determination by the PHA. For example, the PHA is not bound by a grievance determination on a matter other than a proposed adverse action, by a determination concerning general policy issues or class grievances, or by a determination on a matter not properly referred to the hearing officer in accordance with the PHA grievance procedure.

The rule provides that a PHA is not bound by a decision contrary to HUD regulations or requirements, or otherwise contrary to Federal, State or local law (§ 966.33(b)(2)). The PHA has final responsibility to act in accordance with controlling Federal, State or local law, and this obligation may not be altered by any decision of the hearing officer (compare § 966.57(b) of the old lease and grievance rule).

HUD does not agree with comment which argues that the right of the PHA to reject the hearing decision in specified circumstances means that the hearing process is useless. In practice, a PHA will not and can not casually reject the decision of the hearing officer.

—The hearing is conducted under the PHA's own grievance procedure, and decided by a hearing officer appointed by the PHA. A PHA will generally accept that the grievance hearing is a legitimate process for determination of disputes, even if PHA mangement doesn't agree with the particular decision. Once the grievance is decided by the local hearing officer, the decision possesses a moral force—the sense that the dispute has been decided by the proper person in the proper way.

—The hearing decision possesses, as well, the force of inertia. The PHA can not overturn the grievance decision without taking positive action. The PHA must make the requisite determination under this rule (e.g., that the decision is beyond the authority of the hearing officer) and must notify the tenant of the reasons for the determination.

—The requirement to state the reasons in writing tends to compel the PHA to examine whether there is good legal reason to reject the hearing determination. The determination that the PHA is not bound by a grievance decision is issued by the PHA officials to whom the responsibility for making the determination is allocated under the PHA grievance procedure, usually the executive director or the PHA Board). This allocation of responsibility brings the issue up for explicit examination and decision by these PHA officials.

—The PHA does not have open-ended authority to decide that the PHA is not bound by grievance decisions—only an authority to reject the grievance determination in an individual hearing, for one of the reasons allowed under this rule.

—Abusive exercise of this authority by PHA management is potentially subject to objection or legal challenge from various sources—tenants or tenant legal representatives, internal legal or management reviews, HUD management reviews. The PHA may have to respond to lawsuits alleging that the PHA has not made good faith determinations, or that the determinations are arbitrary and capricious.

—Repudiation of a hearing decision adverse to the PHA characteristically does not avoid the issue that was the subject of hearing. the PHA may proceed with the adverse action, such as a termination of tenancy or determination of rent, but may again confront the issue in a legal action to enforce the PHA decision. If a hearing officer concludes that the PHA adverse action is not justified, a court may also independently reach the same conclusion.

In sum, the claim that PHAs will commonly, casually or capriciously overturn valid hearing decisions is not plausible. By and large, PHAs will use the authority for the purpose intended by the rule—to avoid distortion of the hearing procedure by hearing decisions which are *ultra vires* or contrary to law. The old lease and grievance procedure included a similar provision permitting the PHA to issue a determination that a hearing decision is not binding. Public comment on the present rulemaking does not indicate that this authority has been widely used or widely abused. Legal aid comment objects to allowing a PHA to determine that the PHA is not bound by a hearing decision. However, the same legal aid comment also advocates retention of the old lease and grievance rule, which contains similar provisions.

(b) Decision Contrary to PHA Rules and Policy. PHA comment urges that the authority for a PHA to repudiate the hearing decision should be extended to cases where the hearing decision is contrary to PHA rules and policies (as well as decisions contrary to Federal, State or local law). NAHRO comment notes that the PHA needs to uphold and enforce the PHA's own rules and regulations for effective and efficient management of the PHA program.

HUD has not adopted the change recommended by the PHA comment. The issue presented to a hearing officer may raise the question whether application of PHA rules to an individual tenant is a violation of Federal law. Thus the hearing officer should have jurisdiction to determine whether the local rules as applied to the tenant are in violation of Federal law, and the PHA should be bound by the hearing decision on this issue.

HUD respects the PHA concern, as reflected in public comment, with maintaining the authority of the local rules developed by the PHA for management of its public housing projects, and the particular concern that decisions of the hearing officer may infringe on the operation of these local rules. Nevertheless, at this time the Department believes that these interests do not justify allowing the PHA to override the decision of the hearing officer in the grievance process for PHA adverse action.

(c) Who May Decide Hearing Decision Is Not Binding? Under the old lease and grievance rule, the authority to determine that a hearing decision is not binding is vested in the Board of the PHA. Comment on this rulemaking states that the rule should clarify what officers or level of authority may act for the PHA in issuing a determination that the PHA is not bound by a hearing decision. Comment states that the decision that a PHA is not bound should only be issued by the highest PHA officials. The authority to repudiate hearing decisions should only be exercised by the PHA Board. Comment recommends that the rule specify that the decision to disclaim a hearing decision rests in the sole discretion of the PHA Board or Executive Director.

The final rule does not contain any additional clarification or restriction on what body within the PHA may determine that a hearing decision is not binding. The locus of this authority may therefore be determined and specified by the PHA in the PHA administrative grievance procedure.

PHAs differ considerably in program size and PHA organization. There are very large PHAs and very small ones. PHAs do not always have a Board of Commissioners. The PHA may, for example, be a Department of the municipal government, run by an appointee of the mayor. HUD does not find sufficient justification for a universal regulatory requirement to locate the authority to reject a grievance decision in any specific level of PHA management, or any PHA office. There is no special magic to placing authority for rejection of the hearing decision at any particular point in the PHA organization. For example, in a large PHA public housing program it may be appropriate to place the PHA authority to reject a hearing decision in the hands of an administrator with line authority over a portion of the PHA program, rather than in the PHA Board, or the executive director of the whole PHA program.

Comment states that the determination that the PHA is not bound should be made by an impartial party, and should not be a unilateral decision by the PHA. This recommendation is not adopted. In the circumstances described in the rule, the PHA should have ultimate authority to determine whether the decision will bind the PHA. There is no more reason to place this authority in some non-PHA "impartial party" than to allow a final authority to the decision of the original hearing officer. The decision of the impartial party may also be contrary to law. The proposal is also too cumbersome, inserting an additional level into the hearing process to determine if the original hearing decision was either *ultra vires* or contrary to law. The PHA decision that the PHA is not bound by a grievance decision is not the last word on the point at issue in the grievance. Where there is no binding hearing decision, the issue may be finally addressed and resolved in litigation between the tenant and the PHA—such as in the judicial process for eviction of the tenant.

(d) Voluntary Grievance Procedure. Under this rule, a PHA is generally only required to grieve on a proposed adverse action, but may elect to grieve in other circumstances. HUD regulations do not control the form or content of discretionary grievance procedures beyond the scope of the rule (see § 966.35). Comment argues that a PHA which expands the grievance right beyond the field required by HUD should be bound by the hearing decision. Commenters believe that though the decision to grieve in the first place is voluntary, the PHA should be forced to follow the hearing decision. Comment notes the "anomalous possibility" that a PHA which has elected to expand the grievance process might decide that it is not bound by the grievance decision.

HUD believes it would be anomalous for HUD to make binding on the PHA a decision in a hearing process not mandated at all by Federal law or rule. If the PHA is free to grieve or not to grieve on any subject, the PHA should also be free to determine the effect of the decision in the review process voluntarily established by the PHA. A HUD rule which provides that the PHA is bound by the hearing decision, though the decision to establish the hearing process lies in the discretion of the PHA, would inhibit PHAs from setting up grievance procedure beyond the minimum sphere required by HUD.

As described above, the HUD rule (§ 966.33 (b) and (c)) states the circumstances when the PHA is not bound by a hearing decision in the administrative grievance process set up by the PHA in compliance with this rule. The rule does not deal at all with the effect of decisions under discretionary

PHA grievance process not required by HUD, including voluntary extension to additional subjects of the administrative grievance procedure under this rule (see § 966.35).

(2) Effect of Decision on Tenant—When Tenant is Bound. Under the old lease and grievance rule, a tenant who chooses to grieve is nevertheless not bound by a grievance decision in favor of the PHA, or which denies the relief sought by the tenant. The old rule provides that the grievance decision does not affect the tenant's right to a *de novo* trial of the matter at issue in the grievance hearing—a new judicial trial which disregards the administrative grievance decision in favor of the PHA.

PHAs point out that the old grievance procedure is a one-way street. The grievance decision is binding on the PHA, but not binding on the tenant. For the tenant, the decision to seek a grievance hearing carries no risk. Under the old rule, the grievance hearing can be exploited to effectively delay judicial eviction of the tenant, since the PHA may not give notice to vacate before the decision of the hearing officer is issued. In the old system, the tenant has a built-in incentive to grieve, even if the tenant does not expect to prevail at the hearing.

This new rule does not carry forward the old provision that a tenant is not bound by a decision in favor of the PHA. The new rule is silent on whether the tenant is bound by the grievance decision in a subsequent judicial action.

Comment recommends that the rule should restore the tenant's unilateral right to judicial trial *de novo* on the issue decided at the grievance hearing. This recommendation is rejected. HUD believes that the old system was inequitable as between the PHA and the tenant. The old system also tended to promote misuse of the grievance process as a technique to delay legitimate contractual sanctions against the tenant, and also tended to waste administrative resources used in the grievance process.

In the final rule, HUD is silent on whether the grievance decision is in any respect binding *on a tenant* who elects to grieve. HUD leaves this question open to determination by the courts, on the basis of independent State-law principles—whether derived from common-law or State statute—governing the effect of a prior administrative decision on a subsequent judicial action. At this time, HUD does not seek to regulate and impose a uniform Federal rule of law on this question.

Different States may therefore have different answers on whether the grievance decision is binding on the tenant. State law may provide that the decision is always binding, is binding if there is substantial evidence to support the decision, or is not binding (and the tenant entitled to a trial *de novo*). The standard of judicial review may be determined by the type of procedure used in the administrative hearing, including whether there is a written record of the hearing (thus allowing administrative review of the record). In leaving the resolution of these issues to State law, HUD places the public housing adminstrative grievance hearing on the same footing as the treatment of other administrative hearings under State law.

c. Non-use of Grievance Process—Effect on Tenant. Comment states that the regulations should specify that a tenant's non-use of the PHA grievance process does not bar the tenant from raising a grievable matter in court. Comment states that the tenant should not be required to use the grievance process either (1) as a pre-condition for judicial remedy, or (2) as an alternative to a judicial remedy. Comment states that a tenant who does not use the greivance process should have a regulatory right to judicial trial on the issues. The tenant should have a right to judicial trial *de novo.*

In response to public comment, the rule is amended to add a new provision (§ 966.31(g)):

> *Tenant non-use of grievance process.* The Tenant is not required to use the administrative grievance procedure for review of any PHA adverse action. The Tenant is not barred from using any otherwise available judicial procedure for review of PHA adverse action because of the Tenant's failure to use the PHA administrative grievance procedure for review of such action. Such failure shall not waive or affect the Tenant's right to trial on the issues.

The statute requires that the tenant must be given the "opportunity" for an informal hearing on proposed adverse action. The statute does not mandate that the tenant must invoke this opportunity for administrative review. As a matter of policy, HUD believes that availability of an opportunity for administrative review through the PHA grievance procedure should not constrict the tenant's otherwise available access to the courts. The statutory grievance right assures that there is an administrative forum for review of PHA adverse action. The tenant should retain the right to decide whether to use the PHA's administrative hearing process.

8. Existing Grievance Procedure

The new grievance regulation authorize PHAs to make very significant changes in existing grievance procedure—notably by limiting the tenant's right to grieve to a proposed adverse action § 966.31(a)), and by excluding eviction cases from the PHA grievance process (Part 966, Subpart E, see discussion in Preamble, Part VI below). However, the new rule only mandates very modest change in existing grievance procedure.

Grievance requirements under the old rule are more far-reaching, and more complicated than the new regulatory grievance requirements now promulgated by HUD in accordance with the 1983 law. A grievance procedure adopted by a PHA in accordance with the old rule will in most respects satisfy requirements under the 1983 law and the new rule.

A grievance procedure adopted under the old rule applies broadly to individual disputes between the PHA and a tenant. An existing PHA grievance procedure for matters outside the coverage of the mandatory grievance procedure under the final rule is not controlled by the new administrative grievance requirement. For such matters, no change is compelled by the proposed rule.

With respect to PHA proposed adverse action, it appears that in general a PHA will only need to modify the existing grievance procedure in two major respects:

First. Under the old rule (§ 966.51(a)), the PHA may exclude from its grievance procedure a grievance concerning an eviction or termination of tenancy if tenant action threatens health or safety of tenants or PHA employees. The PHA may only use this exclusion authority if State law requires a due process court hearing before eviction of a tenant. Although the 1983 law (section 6(k) of the U.S. Housing Act of 1937, 42 U.S.C. 1437d(k)) contains a broader authority to exclude grievances concerning termination of tenancy or eviction than under the old rule, the exclusion depends on a determination by HUD on due process adequacy of the State procedures. Until the HUD determination is issued pursuant to this rule, the PHA must give a tenant the opportunity for an administrative hearing on any proposed termination of tenancy, *including* a termination where the tenant has created a threat to health or safety of tenants or employees.

Second. The new rule requires that the PHA give notice of a proposed adverse action (§ 966.31(b)). The PHA must implement this new requirement.

It might also be necessary to modify procedures for selection of a hearing officer or hearing panel, where the old procedure for designating a hearing officer does not comply with the new rule.

Some PHAs may be largely content with operation of the grievance requirements under the old rule. A PHA may conclude that changing the PHA grievance procedure would be harmful to project management or tenant relations. A PHA may wish to retain, in whole or in part, the PHA's existing grievance procedure under the old rule.

Comment states that a PHA should be allowed to keep the present grievance procedure adopted under the old rule. Comment states that the rule text should specify that a PHA may retain the present grievance procedure with minimal modification.

In fact, PHAs may largely retain present grievance procedures with modest modification. Once HUD has made the required statutory due process determination, a PHA may, as in the past, deny a grievance right for cases which present a threat to health or safety of tenants and employees (but without necessarily adopting the broader exclusion of termination of tenancy and eviction allowed under the new rule). HUD finds no need to clutter the rule text with transitional references to ability of the PHA to retain its existing grievance procedure, since there are no special rules for transition cases.

Comment recommends that a PHA which wants to modify an existing grievance procedure should be required to give notice to tenants, and that tenants should be adequately represented in the process for determining the changes to be made. HUD finds no reason to mandate an additional notice to the tenant, other than the required general description of the PHA grievance procedure (discussed in section V.E.2 of this Preamble). To the extent that the PHA's revised grievance procedure differs from the procedure described in tenant information materials previously distributed by the PHA (or if the PHA has not previously given the tenant a general description of the PHA grievance process), then the PHA must give the tenant a general description of the revised grievance procedure adopted by the PHA in accordance with this rule (§ 966.30(d)).

With respect to tenant participation, this rule broadly leaves decisions on the extent and mode of consultations with residents to the administrative discretion and management judgment of the PHA. HUD lacks any plausible reason for adopting a different and more prescriptive definition of the PHA's process for adopting a new grievance procedure in accordance with this rule.

9. Settlement of Disputes—Informal Settlement of Disputes and Voluntary Grievance Procedures.

Comments point to the advantages of an administrative procedure to resolve disputes between the PHA and its tenants. By using a grievance procedure, disputes can be resolved without litigation. The grievance procedure offers a less adversarial way of working out problems.

The old lease and grievance rule required by the PHA to provide a formal administrative grievance hearing for disputes with tenants. The old rule also required that the PHA grievance procedures give opportunity for informal discussion and settlement of the grievance without a hearing.

The instant rule requires the PHA to grieve on a proposed adverse action. The rule does not require the PHA to provide a grievance hearing on other disputes with the tenant. The rule also does not direct the PHA to give opportunity for discussion and settlement of disputes, either those on which the PHA must grieve (i.e., PHA adverse actions), or those which are outside the scope of the grievance requirement. However, the PHA and the tenants may develop other mechanisms for avoidance and settlement of disputes. The rule provides (§ 966.35):

> "At its discretion, a PHA may provide additional means for Tenant opportunity to comment upon, or for Tenant opportunity to request PHA consideration of, *any matter pertaining to the Tenant's occupancy or the Tenant's rights or obligations.* The discretionary PHA procedures may be designed for the purpose of affording an opportunity for informal clarification and resolution of disputes or potential disputes." (emphasis supplied).

PHA comment largely supports the grievance procedure proposed by HUD, including limitation of occasions on which the PHA is required to grieve, and the discretion of the individual PHA to decide whether and how to extend opportunities for resolution of disputes with the tenants.

Legal aid comment objects to narrowing the scope of a tenant's right to grieve. Comment also criticizes elimination of the PHA duty to provide an opportunity for informal settlement of disputes. PHA-tenant disputes are often solved in the informal settlement procedure under the old rule. Informal settlement avoids the need for a full blown grievance hearing. A PHA's administrative grievance procedure may be better than the courts in crafting a solution to public housing disputes.

The rule only directs a PHA to give a tenant grievance hearing for proposed adverse action, as required by the 1983 law. However, the PHA may choose to give grievance hearings not required by statute or regulation. In the spirit of the statutory policy to vest maximum administrative discretion in the PHA (U.S. Housing Act of 1937, section 2; 42 U.S.C. 1437), the PHA should enjoy the discretion to determine whether to broaden the administrative hearing right. The informal and creative local resolution of disputes is more likely to be favored by allowing a broad play to local experience and judgment, than by requiring the PHA to use a formal grievance mechanism imposed by HUD.

The rule does not require the PHA to provide a structured opportunity for settlement of tenant disputes that do not stem from proposed adverse action, or to provide opportunity for informal pre-hearing discussion with the tenant. The individual PHA is well able to devise procedures for communication with tenants, and for heading off and solving disputes. The search for appropriate local techniques to prevent or resolve PHA-tenant disputes is not aided by shaping the local process of tenant-management relations in a Federal mold. Above all, the process depends on the good faith, flexibility and openness of the local parties.

Comment states that the compromise embedded in the 1983 law does not show an intent to abandon the informal conference in the old lease and grievance procedure. To this, HUD responds that nothing in the legislative history shows any intention by the Congress to make the old informal conference requirement an element of the statutory grievance process under the 1983 law. The silence of the Congress cannot be read, as the comment suggests, an implicit enactment or endorsement of all procedures required under the old lease and grievance rule. The Department is not and should not be bound to retain elements of the old lease and grievance rule which were omitted from the law passed by the Congress in 1983.

HUD supports development by each PHA of local channels and procedures for venting tenant concerns, or for resolution of disputes between the PHA and project residents. The PHA may establish locally devised procedures to avoid or resolve disputes or potential disputes between the management and the tenants.

F. Mutual Help and Turnkey III Homeownership Opportunity Programs—Grievance Procedure

1. Mutual Help and Turnkey III—Applicability of Grievance Procedure

Grievance requirements under the statute and this rule are applicable to Turnkey III and to Indian housing, including Mutual Help.

The rule provides that grievance requirements (Part 966), Subparts D and E) are applicable both to "public housing" and to "Indian housing" (§ 966.1(c)).

"Public housing", as defined in this rule, is "housing assisted under the U.S. Housing Act of 1937" (definition at § 966.2). The Turnkey III Program is developed and operated with assistance under the U.S. Housing Act of 1937, and is within the definition of public housing. The proposed rule stated that "public housing" includes the Turnkey III Homeownership Opportunity Program. In the final rule, the specific reference to Turnkey III is deleted from the definition of "public housing". Turnkey III falls within the broad definition of public housing, and a specific reference to Turnkey III is not needed.

The rule provides that grievance hearing requirements are applicable to Indian housing (§ 966.1(c)). "Indian housing" is defined (§ 966.2) to include the Mutual Help Program (administered by an Indian Housing Authority ("IHA") under Part 905).

The Turnkey III and Mutual Help regulations are amended to state (§ 904.107(p)(1), and § 905.424(g)(1)) that the public housing administrative grievance regulations are applicable to these programs.

2. Mutual Help and Turnkey III—Special Provisions

Because of the special characteristics of the Turnkey III and Mutual Help homeownership programs there are a few technical differences between the grievance procedure used for these programs and the procedure used for public housing rental projects. These differences concern (1) the definition of proposed adverse action, and (2) the notice by the PHA to the homebuyer of a proposed adverse action (see § 966.34).

Proposed Adverse Action

The rule separately states the cases which are "proposed adverse action" (for which the PHA must give the opportunity for a grievance hearing) in the Turnkey III Program and in the Mutual Help Program (§ 966.34(a); § 904.107(p)(2); § 905.424(g)(2)). The following cases are considered adverse actions by the PHA:

(1) For Mutual Help, a propsed PHA (IHA) decision determining the amount of credits to the homebuyer's MH contribution accounts.

(2) For Mutual Help and Turnkey III, a proposed PHA decision determining the amount of the required monthly payment, or determining the amount owing on account of the required monthly payment; a proposed PHA decision determining charges by the PHA against the homebuyer accounts (Turnkey III EHPA or NRMR; Mutual Help MEPA, VEPA or MH reserve accounts); or a proposed decision determining the PHA's proposed settlement at termination of the homeownership agreement or at purchase of the home by the homebuyer.

(3) For Turnkey III, a proposed decision that the homebuyer has lost homeownership potential and should be transferred to a rental unit.

(4) For Mutual Help and Turnkey III, a proposed decision to terminate the homebuyer agreement (Turnkey III Homebuyers Ownership Opportunity Agreement or Mutual Help and Occupancy Agreement), or to evict the homebuyer from the home after such termination.

Notice of Proposed Adverse Action

A PHA must give the homebuyer-tenant notice of a proposed adverse action (§ 966.31(b)). For Turnkey III, the rule clarifies that a notice terminating the homebuyer agreement or giving notice that the homebuyer has lost homeownership potential (and should therefore be transferred to another unit) may be combined with a notice of proposed adverse action (§ 966.34(b)(1)). For Mutual Help, the rule clarifies that a notice terminating the MHO Agreement may be combined with a notice of proposed adverse action (§ 966.34(b)(2)).

VI. Termination of Tenancy or Eviction—Exclusion From PHA Administrative Grievance Procedure

A. When PHA Can Evict Without Grievance Hearing—Requirement for Due Process Determination

The 1983 amendments require a public housing PHA to establish and implement an administrative grievance procedure (U.S.H. Act of 1937, section 6(k), 42 U.S.C. 1437d(k)). The amendments also provide that a PHA:

> * * * may exclude from its [administrative grievance] procedure any grievance concerning an eviction or termination of tenancy in any jurisdiction which requires that, prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process.

Under this law, the PHA does not have to offer tenant a grievance hearing before eviction if HUD has first determined that the law of the jurisdiction requires due process protection before eviction. A PHA may remove grievances over termination of tenancy or eviction from the PHA's grievance process. Part 966, Subpart E of the rule establishes the procedure for these determinations by HUD.

In the final rule, the HUD determination that local law provides the opportunity for a pre-eviction due process hearing in court is called a "due process determination" (definition at § 966.2; cf., § 966.41(a)(1)). This is a change of terminology from the proposed rule, in which the statutory HUD determination was called a "determination of recognition". No substantive change is intended by substitution of the new term. The term "due process determination" better conveys the purpose of the HUD determination—a determination that State law requires the elements of due process.

The due process determination will be made at the request of an individual PHA. To make a due process determination, HUD Counsel will examine legal requirements for eviction in the PHA jurisdiction. If there are alternative legal processes for eviction in the PHA jurisdiction, the HUD due process determination may be issued for different eviction procedures within the PHA jurisdiction.

This rule sets up a procedure for issuing the HUD determinations with the least extra or unnecessary difficulty or delay. The procedure allows a full opportunity for tenant comment before issuance of a HUD due process determination.

For a PHA to exclude grievances concerning termination or tenancy or eviction from the administrative grievance procedure, HUD must determine that specified procedures for judicial eviction under State and local law require that before eviction from the dwelling unit a tenant must be given the opportunity for a hearing in court which provides the basic elements of due process (§ 966.41(a)(1)).

The PHA's decision to exclude grievances concerning termination of tenancy or eviction must be stated in the written grievance procedure adopted by the PHA (§ 966.41(a)(3)).

B. Public Comment—General

Comment from PHAs strongly supports issuance of a rule which authorizes a PHA to exclude eviction cases from the PHA administrative grievance process in accordance with the 1983 law. Comment from legal aid offices strongly opposes this new authority for the PHA to evict without an administrative grievance hearing.

Comment in opposition asserts that HUD should reject the "statutory invitation" to take eviction out of the grievance process. Comment acknowledges that exclusion is permitted by Federal statute, but claims that exclusion is poor policy.

Comment states that tenants are vulnerable, and need the protection of the PHA grievance process. A tenant has the greatest need for the administrative grievance process when the PHA is trying to terminate the tenancy. Disputes can be resolved in the grievance process. If the eviction is dropped, the PHA saves litigation costs.

Comment states that exclusion will force disputes into court. The tenant can't adequately defend against eviction in the court proceeding. Comment also expresses lack of faith that the tenant will really get a fair hearing in the local court eviction process.

Comment in favor of exclusion states that exclusion will be very helpful to PHAs, and will be welcome to tenants who want to live in a good and peaceful environment. Comment points out that the old rule requirement to use the administrative grievance process for an eviction is burdensome and expensive, that the grievance requirement delays eviction of tenants, and that the tenant can get a fair hearing in the State court. The National Association of Housing and Redevelopment Officials (NAHRO) states that HUD should be commended for allowing the use of State court evictions instead of a HUD-regulated grievance process. NAHRO comment remarks that the rule will return PHAs to local control, and will decrease PHA administrative burden and costs resulting from the old grievance rule.

PHA comment states that it has become increasingly difficult to evict tenants under the current grievance regulation. Tenants and the community wonder why the PHA does not act. The grievance requirement undermines respect for the PHA.

PHA comment asserts that the administrative grievance process adds cost and time for PHA enforcement of the law. Exclusion will halve PHA legal costs. A PHA hails HUD for proposing elimination of administrative grievance procedure for termination of tenancy. The PHA gives a strong statement of arguments for allowing a PHA to exclude termination of tenancy from the grievance process:

> The only way a tenant can be evicted in [the PHA's State] is by judicial decision, after a full due process hearing in justice court. If a tenant is dissatisfied with an adverse decision in the justice court, the tenant can appeal for a trial de novo in the county court at law, and have a second full due process hearing on the eviction. The current Rules give the tenant two preliminary administrative hearings before the two full due process trials in the state courts. During the last ten years, the currently required grievance hearing procedures have cost the Housing Authority literally tens of thousands of dollars in administrative costs and legal fees, not to mention the tremendous drain on Housing Authority manpower. Tenants have learned that requesting an informal and formal grievance hearing before a three member panel is an easy way to delay a trial in the justice court. This tenant abuse of the grievance procedures and the tremendous burden on the Housing Authority to provide the administrative grievance hearings, are completely unwarranted in light of the due process hearings allowed tenants in state courts.

HUD will implement the statutory grievance exclusion under the 1983 law, and will not reject the statutory "invitation". Congress simultaneously enacted the statutory grievance requirement for a PHA adverse action, and the authorization for PHA to exclude termination of tenancy from the eviction process (where HUD determines that State law requires basic due process before eviction from the unit). This statutory scheme evidently reflects a Congressional sense of the balance between the benefits and burdens of a grievance process to challenge adverse actions by the PHA. Where the tenant can get a pre-eviction due process hearing in State court, the benefits of providing a duplicative administrative hearing for the tenant do not match the burdens.

PHAs have day to day experience in administration of the old grievance hearing requirement. Comment by PHAs persuades the Department that implementation of grievance exclusion as permitted under the 1983 law will greatly assist in effective management of public housing projects for the general benefit of public housing tenants. Prompt processing of evictions through judicial process will enforce compliance with tenancy requirements, including rent payment, care of the units and compliance with project rules. Families are more likely to comply with obligations of the assisted tenancy if eviction, the most serious potential sanction for non-compliance, can be surely and quickly carried out—without the added delay and uncertainty of the administrative grievance process.

PHA comment also indicates that elimination of the grievance requirement for a termination of tenancy will relieve the PHA of a considerable expense and administrative burden.

HUD concludes that implementation of exclusion under the 1983 law carries out a Congressional judgment of the appropriate balance of interests, and is very good practical policy. Implementation of exclusion is fair to the tenants affected—who have the legal right to a fair hearing in State court. Exclusion favors as well the general interest of public housing tenants that projects should be well and effectively managed.

We consider also a number of other particular questions on the exclusion procedures under the 1983 law.

Comment claims that the exclusion of termination of tenancy and eviction from the grievance process is a violation of due process. HUD sees no plausible basis for this claim. A public housing tenant has a property right to occupy the unit in accordance with terms of the lease.

Under Federal law, the tenant may not be evicted without statutory good cause (lease violation or other good cause). Where the PHA seeks to evict, the tenant must be given a due process hearing on whether there is good cause for eviction.

There is not, however, any Constitutional right to an *administrative* pre-judicial hearing on eviction of a public housing tenant, much less a Constitutional right to duplicative administrative and judicial hearings on the grounds for termination of tenancy. Many cases have concluded that existence or non-existence of good cause for eviction of an assisted tenant may be determined by a State court hearing, and that there is no Constitutional requirement for a prior administrative hearing on the eviction. The right to a grievance hearing in public housing is purely statutory. The restriction on availability of this statutory right (the statutory provision that the right to a grievance hearing does not apply where HUD has determined that State law requires the elements of due process) is merely a statutory limitation on a statutory right. Congress was not Constitutionally compelled to provide any administrative grievance hearing on a termination of tenancy, and may Constitutionally establish any limitation on availability of the hearing right.

Comment recommends that the grievance exclusion should be limited to those types of eviction most determinable by objective evidence—that is, deciding whether the tenant has paid the rent. HUD finds no justification for this proposed restriction of the cases eligible for exclusion from the PHA grievance process. State courts customarily consider a vast variety of contractual or other legal issues in connection with landlord-tenant relations and other issues. HUD finds no reason to believe that State courts cannot competently consider the whole range of legal issues connected with eviction of a public housing tenant, including whether the tenant has violated obligations of the assisted tenancy other than the simple obligation to pay rent. There is no reason at all to believe that these broader issues would be better handled in the PHA's administrative grievance process.

Comment states that in a particular State, the State mandates a grievance process for residents of State-aided low income projects. The comment states that the same grievance requirements should also be applicable to tenants of Federal public housing projects. Otherwise, tenants in different projects will have different rights, depending on whether the tenants live in State or Federal projects.

A State may establish a grievance procedure or other management requirements for State-aided projects. That is the prerogative of the State. HUD should not, however, attempt to mimic State hearing requirements for State-aided projects. The State may, if it wishes, establish additional procedural protections for public housing tenants that do not conflict with Federal public housing requirements under the Federal statute and rule. The State may choose to require the public housing PHA to offer the tenant an administrative grievance hearing when there is no Federal requirement for such a hearing. HUD has not pre-empted the field of action in this respect. The State may properly decide what additional procedural protections are appropriate for assisted tenants, and whether the additional protections should be identical in Federal and State-aided projects.

C. What is a Due Process Determination?

1. What HUD Determines

Under the 1983 statute, HUD must determine whether a jurisdiction "requires" a hearing that provides the basic elements of due process before eviction of a tenant (U.S. Housing Act of 1937, section 6(k), 42 U.S.C. 1437d(k)). To implement the law, HUD will determine whether *State or local law* requires the elements of due process.

To carry out the statute, a "Due Process Determination" is defined (§ 966.2) as:

> A determination by HUD that specified procedures for judicial eviction under State and local law require that a tenant must be given the opportunity for a hearing in court which provides the basic elements of due process before eviction from the dwelling unit.

2. Elements of Due Process

a. Definition of Elements. The 1983 law specifies the minimum elements of an administrative grievance hearing by the PHA. However, the statute does not list the "basic elements of due process" in a court proceeding to evict the tenant. Definition of these elements is left to administrative determination by HUD. The regulation therefore defines (§ 966.2) the "elements of due process". The elements in the HUD definition will assure, in accordance with the statutory purpose, that before eviction from the unit the tenant has the right under local law to a judicial hearing on the grounds for termination of tenancy, and that a hearing in accordance with the local law would meet the requirements of procedural due process under the Constitution.

In response to public comment and further consideration by the Department, the proposed due process definition has been refined in the final rule. The reasons for the changes are described in this section.

The final rule (§ 966.2) provides that "elements of due process" means that:

> The court procedures for eviction under State and local law require all of the following before eviction from the dwelling unit:
>
> (a) The opportunity for a hearing on the existence of serious or repeated lease violation or other good cause reasons for eviction * * *.
>
> (b) Advance notice of the hearing, and of the alleged reasons for eviction.
>
> (c) Hearing before an impartial party.
>
> (d) The opportunity to be represented by counsel.
>
> (e) The opportunity to present evidence and question witnesses.
>
> (f) A decision on the reasons for eviction before the occupants are evicted.

Some comment asserts that HUD's proposed definition of minimum due process elements does not give sufficient protection for the tenant. Comment questions specific elements in the definition. Comment states that the 1983 statute does not prohibit HUD from establishing broader safeguards for the tenant family, and states that the interests of an indigent family should have greater protection.

It is the sense of the Department that the regulation definition in the final rule carries out the letter and spirit of the statutory requirement. The HUD definition conforms with Constitutional standards for procedural due process as applied to a judicial proceeding for eviction of a tenant. HUD's definition of the basic due process elements affords notice and the opportunity to be heard on the existence of a statutory basis for termination of the assisted tenancy (section 6(l)(4) of the U.S. Housing Act of 1937, 42 U.S.C. 1437d(l)(4)).

The definition of due process elements in this rule provides the appropriate level of procedural protection for the assisted tenant. The further accretion of elaborate procedural safeguards in the definition of basic due process is not needed to protect the central legitimate interest of an assisted tenant faced with the prospect of eviction—a fair chance to be heard in court. The interest of the tenant does not justify preserving the tenant's opportunity for a dual hearing as mandated under the old rule—first in an administrative grievance process, and then again in State court. "Due process does not, of course, require two hearings" (*Goldberg* v. *Kelly*, 397 U.S. 254, 267, n. 14, 90 S. Ct. 1011, 1020 (1970)). PHA comment testifies to the waste, delay and administrative burden of precluding PHAs from direct resort to the courts. The price for denying the PHA direct and immediate access to judicial eviction procedures is primarily paid by those who live in public housing, and who must put up with continued residence by other tenants who violate the lease and program requirements.

In the old lease and grievance rule, there is a definition of "elements of due process" (old rule § 966.53). In a jurisdiction which requires a pre-eviction judicial hearing containing the elements of due process as defined in that rule, the PHA was not required to grieve on the eviction of a tenant who creates a threat to health or safety of PHA tenants or employees. In 1983, the House first passed a bill requiring HUD to establish an administrative grievance procedure "in accordance with the basic safeguards of due process" (Rpt. 98–123 at 175, 5/13/83). Comment on the proposed rule states that in 1983 the House of Representatives intended HUD to retain the pre-existing regulatory definition of due process, and that there is "no indication" that the Congress repudiated the intention of the House.

There is no statutory requirement for HUD to use the old regulatory due process definition in determining "basic elements of due process" under the 1983 law. The House bill and associated legislative history does not indicate any proposed legislative determination on the point.

First, the original House bill required the establishment of an administrative grievance process, but did not—unlike the law actually enacted by the Congress—allow a PHA to bypass the grievance process if due process procedures are available in State court. Thus the House legislative history does not express any intention on the meaning or implementation of due process where the PHA elects to bypass the administrative grievance procedure.

Second, the House bill required the PHA to adopt administrative grievance procedures "in accordance with the basic safeguards of due process" but not less than as set forth in specific provisions of the old lease and grievance rule ("§ 866.56 through 866.59"). The list of enumerated regulation provisions in the House bill does not include the old rule provision (§ 866.53) which defines "elements of due process". This suggests that the House bill did not intend to freeze this aspect of the old lease and grievance procedure.

HUD has the authority and obligation to implement the law passed by the Congress. The due process terminology of the statute is drawn from the Constitution. HUD is not bound to the elements of due process once defined by HUD regulation, but by the elements of procedural due process under the Constitution. The HUD administrative definition in this rule is consonant with the Constitutional balancing of interests in determining the requisites of a due process hearing in a court proceeding for eviction of an assisted tenant (cf. *Matthews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976)).

b. Notice. The proposed rule definition provided that elements of due process includes "advance notice of the grounds for eviction or termination of tenancy". The definition in the final rule has been revised to require "advance notice of the hearing, and of the alleged reasons for eviction" (§ 966.2).

The change clarifies what must be included in a due process notice. The notice must include notice of the hearing proceeding, as well as notice of the matter to be determined at the hearing—whether there are good cause reasons for termination of tenancy or eviction. The tenant has to know that there will be opportunity for a hearing, and has to know what questions may be tested at the hearing.

The concept of due process "notice" implies that the notice must be given in a manner reasonably calculated to inform the interested parties that the action is pending (*Greene* v. *Lindsey*, 456 U.S. 444, 102 S. Ct. 1874 (1982)). This rule does not seek to specify what procedure for service of notice is Constitutionally adequate. However, when making a due process determination, HUD will determine both whether the *content* of the notice gives adequate notice of the proceeding and the reasons for termination of tenancy, and whether the State-law *procedure* for serving the notice is Constitutionally adequate.

Comment objects that the proposed rule does not specify that notice must be "adequate". Comment states that there should be specific pleading of the good cause grounds for eviction, or that the notice must be detailed and complete enough so that the tenant can prepare a defense.

HUD does not see a need for more detailed pleading rules. The Constitution does not require any particular form of pleading, so long as the pleading or other State notice gives reasonable notice of the hearing proceeding and of the hearing subject. There is no doubt many possible ways to express the requirement for notice of what is to be determined in a hearing. The rule states that the due process notice must state the "alleged reasons for eviction". The statement tells the tenant what is to be decided in the hearing. This formulation is similar to the statement by the Supreme Court, in *Goldberg* v. *Kelly*, that a beneficiary of assistance must have notice "detailing the reasons for a proposed termination" (397 U.S. 254, 267–268, 90 S. Ct. 1011, 1020 (1970)).

Comment objects that the rule does not specify that the due process notice must go to the *family*, as well as to the *tenant* (the family member who executes the lease on behalf of the family (§ 966.2)). HUD does not agree with this comment. In determination of matters under the lease, the PHA may serve notice on the tenant. The tenant is the legal representative of the family. In accordance with conventional landlord-tenant practice, the tenant is the holder of legal rights under the lease, and exercises the leasehold rights on behalf of the occupants, including both adults and children residing in the unit. It is not practical or Constitutionally necessary that the PHA should have to separately serve other individual members of the family, in addition to the tenant.

The requirement for due process "notice" does not signify that there must be a *single* document or *single* process that conveys the necessary information to the tenant. State landlord-tenant laws commonly mandate a two-step notice process to maintain an action for eviction of a tenant. Landlord must first serve a "notice to quit" the property by the end of a specified notice period defined by State law. After expiration of the notice, landlord may commence the legal action for possession of the property, by service of the complaint or other appropriate process. For purpose of determining whether the State-law notice meets the requirements of basic due process, it does not matter whether State law requires one notice or two, or (if there is more than one required notice) which of the State-law notices holds the necessary information. In making the due process determination, the question for HUD is whether—under State law—the tenant must be given the necessary information in advance of the hearing.

Assume, for example, that the contents of the complaint contain all the necessary due process information, and that the complaint is served in a manner reasonably calculated to give notice of the hearing. In such a case, HUD does not have to consider whether the information is also given in a State-law notice to quit, or whether the process for delivery of the notice to quit is Constitutionally adequate to afford notice of the hearing. HUD's due process determination may be solely based on the adequacy of the notice given by service of the complaint.

In another type of case, the notice to quit and the pleading in the eviction proceeding may be separately insufficient, but may be complementary elements of the due process notice. For example, the notice to quit may adequately state the grounds for termination of tenancy, and the complaint may give notice of the hearing proceeding which is to determine the validity of the grounds for termination. The HUD due process determination may conclude that proper due process notice is contained in the combination of the two State-required notices, although in isolation neither of the State-law notices would afford complete and Constitutionally adequate notice of the hearing proceeding.

Comment states that the list of due process elements should require notice of a summary ejectment action fourteen days before trial. The rule (§ 966.22) requires that the PHA must give Federal statutory notice of lease termination in accordance with the 1983 statute (U.S. Housing Act of 1937, section 6(l)(3), 42 U.S.C. 1437d(l)(3); see discussion at Preamble, section IV.B). In a termination for non-payment of rent, the tenant must be given the Federally-required fourteen days notice.

In a non-payment case, the tenant will have at least fourteen days Federal statutory notice of lease termination, *plus* whatever notices are required by State law. The tenant's interest in adequate notice of the eviction trial does not justify extending the minimum notice requirement under Federal law, by prescribing another fourteen day State-law notice of trial after or independent of the HUD-required notice of lease termination. The due process determination by HUD should not be used as a vehicle to federalize the incidents of a possessory process established by State law.

c. Discovery. The elements of due process listed in the proposed rule (§ 966.2) provided that the eviction procedures must include "the opportunity to examine relevant evidence in the possession of the PHA". This provision was intended to allow tenant the opportunity for discovery of PHA evidence during the course of the eviction action, but without attempting to insist on any particular discovery process.

Comment advocates that the definition of due process elements should include a stronger and more precise statement of the tenant's right to discovery—both as to the point at which discovery must be made available, and as to the matters which must be disclosed. Comment states that there should be a right to full *pretrial* discovery, that tenant discovery should be long enough before hearing so that the tenant can prepare a defense, and that that full pre-trial discovery must include the right to subpoena third parties, and the right to depose PHA employees and potential witnesses. Comment states that discovery should not be limited to evidence in possession of the PHA, that the PHA must be under a duty to provide all relevant evidence in the tenant's file, and that the tenant must be given the opportunity to examine governing regulations.

Comment remarks that State law may not allow for pretrial discovery in eviction proceedings. Comment observes that HUD has gone beyond the requirements of procedural due process as articulated by the Supreme Court, in demanding that the State procedure offer an advance opportunity to examine evidence in the hands of the landlord. The comment notes that in *Goldberg v. Kelly,* 397 U.S. 254, 266–270, 90 S. Ct. 1011, 1020–1021 (1970), which contains the most demanding and explicit statement by the Supreme Court of procedural due process requirements for termination of federal subsidy, "there is no mention of depositions, admissions or document production". Since *Goldberg,* the Supreme Court has suggested a more cautious and case-by-case approach to the judgment of what elements are required for a due process hearing in different contexts. In *Matthews v. Eldridge,* 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976), the Supreme Court states that in cases after *Goldberg* "the Court has spoken sparingly about the requisite procedures".

Some States has adopted procedures for fast trial of eviction actions, called summary proceedings. These accelerated procedures may not include any provision for pre-trial discovery. In *Lindsey v. Normet,* 405 U.S. 56, 92 S. Ct. 862 (1972), the Supreme Court upheld the authority of a State to establish summary eviction proceedings which provide for expedited trial, and which limit the defenses which may be presented by the tenant at trial. "We are unable to conclude that either the early-trial provision or the limitation on litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment" (405 U.S. at 64, 92 S. Ct. at 869).

As we have noted, comment on the proposed lease and grievance rule claims that the opportunity for pre-trial discovery is necessary so that a tenant can prepare for trial. In *Lindsey,* the Supreme Court rejects the similar claim that provision for expedited trial in a summary proceeding "allows an unduly short time for trial preparation".

> *Tenants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease, whether they have paid the rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary."* (405 U.S. at 65, 92 S. Ct. at 869–870) (emphasis supplied)

By parity of logic, due process does not require that a tenant must be given pre-hearing access to information in the possession of the PHA, much less the full discovery procedures demanded in certain comment.

The old lease and grievance rule provides (§ 966.53(b)(4)) that "elements of due process" in an eviction action includes an opportunity for pre-trial discovery of relevant documents, records and regulations of the PHA. In a jurisdiction where State law requires a pre-eviction hearing that comports with the HUD due process definition, the PHA was not required to give a grievance hearing to a tenant who creates a threat to health or safety of tenants or employees. In *King v. Housing Authority,* 670 F. 2d 952 (11th Cir. 1982), Alabama law did not require that a tenant must be given pre-eviction discovery according with the due process definition in the HUD regulation. The court held that the PHA must therefore afford tenant an administrative hearing before bringing an action for eviction in the State court. It is plain, however, that the court's decision was not based on a determination that Constitutional due process requires an opportunity for pretrial discovery, but on the PHA's duty to comply with the regulatory due process definition promulgated by HUD. The *King* court states that it is:

> *immaterial that [State] eviction proceedings comport with fourteenth amendment due process requirements.* The Secretary of HUD in his discretion can promulgate regulations which preclude subsidized housing authorities from denying tenants administrative hearings when state eviction proceedings do not require any 'elements of due process' which are deemed necessary by the Secretary. This is so *regardless of whether the regulatory elements of due process are Constitutionally mandated."* (670 F.2d at 955) (emphasis supplied)

The final rule eliminates the proposed provision that elements of due process must include the opportunity to examine evidence in the PHA's possession. The final rule does not require that the tenant must have the opportunity for discovery in the State eviction proceeding.

A proceeding for eviction of any tenant, subsidized or unsubsidized, tests the property right of the tenant to live in the housing. Nevertheless, the Constitution does not require that a proceeding for dispossession must allow opportunity for discovery prior to hearing. HUD should not deny to PHAs which administer public housing projects the ability to use State summary eviction procedures that accord with the requirements of due process.

Public housing PHAs have a strong management interest in the use of the same expedited eviction procedures which may be used by a private landlord. The need of the PHA for use of such procedures may be more compelling than the need of a private landlord. Management of public housing is typically more difficult than management of private and unassisted housing. The PHA selects its tenants from the universe of eligible poor families, and therefore does not have the same latitude as a private owner to select tenants who meet the owner's admission standards. The public housing population includes many families with serious social problems. If public housing tenants know that the sanction for non-payment or other breach is sure, fast and effective, tenants are more likely to pay rent promptly and to fulfill other obligations under the lease. The PHA should have the management tools to cope with the difficult problems of public housing project management, including the availability of State summary judicial process to evict a tenant who violates obligations of the assisted tenancy.

d. Other Proposed Elements. Comment states that the list of due process elements should include the opportunity for jury trial and review by a law-trained judge. HUD finds no justification for adding these elements. Neither element is a prerequisite of Constitutional due process. Neither is necessary to assure a fair hearing on the merits.

We are mindful that under the 1983 law HUD is only called to determine the "basic" elements of due process, not to devise and impose a Federal civil procedure for eviction of a public housing tenant.

Comment states that due process should include the right to a written decision with specific findings of fact and conclusions of law. We do not agree that a written decision is an element of Constitutional due process in a judicial proceeding for termination of tenancy. A written decision, or a statement of the legal basis for opinion, is not an element of the opportunity to be heard in the eviction action, and the existence of a written decision does not as such change or affect the character of the decision. It may be that a written decision, or especially a reasoned statement of decision, enhances the authority and acceptance of the hearing process, or that existence of a written decision may facilitate appeal of the decision. However, the Constitution does not require a written decision as an element of procedural due process in a judicial proceeding for repossession of real property.

Comment states that the regulations must require a judicial hearing where a tenant may raise *any issue* regarding termination, including rent calculation. Comment also avers that judicial process deprives tenants of a full due process hearing if the court may issue an order excluding particular issues from consideration.

The rule provides that due process requires the opportunity for a hearing on the good cause reasons for termination of tenancy. If the alleged reason for termination is non-payment of rent, then a due process hearing should consider germane defenses, such as tenant's allegation that the rent was not calculated in accordance with HUD requirements, or that the tenant has paid the proper amount. The rent calculation procedure bears directly on the issue which must be heard—whether the PHA has adequate reasons for eviction of the tenant. We do not think that there is a need for further emphasis or explanation in the rule that the opportunity for a judicial hearing and decision on the reasons for termination imports that the court must consider issues necessary to that determination.

It does not follow, however, that the tenant must be allowed to raise in the eviction proceeding all issues concerning the tenancy. In *Lindsey v. Normet*, the Supreme Court held that a State does not deny due process of law by restricting the issues in an action for summary dispossession to whether the tenant has paid rent and honored tenant's covenants under the lease (405 U.S. at 64–69, 92 S. Ct. 870–872). State law may bar the tenant from raising in the summary non-payment proceeding a claim that the owner has failed to maintain the premises or failed to perform other obligations under the lease.

Comment claims that a requirement that tenant pay rent into court pending final judgment is a deprivation of due process. In *Lindsey v. Normet*, the Supreme Court rejected the claim that a requirement for the tenant to provide security for accruing rent (as a condition for delay in trial) is a violation of procedural due process. "A requirement that the tenant pay or provide for the payment of rent during the continuance of the action is hardly irrational or oppressive" (405 U.S. at 65, 92 S. Ct. at 870).

There may be cases where State law allows the landlord to use eviction procedures which truncate litigable issues, or which require the tenant to post security, in such a way that under these procedures the tenant is effectively denied a fair opportunity for hearing on the Federal grounds for termination of tenancy. If State law on its face permits a landlord to use procedures that effectively deny tenant's opportunity to a hearing, then an eviction process by use of such procedures does not require the elements of due process. HUD will not issue a due process determination for those procedures.

e. Revision and Reorganization of Definition. In the final rule, the definition of due process elements is reorganized, and is slightly rewritten for emphasis and clarity. All of the separate listed due process elements ultimately pertain to the question whether the State law requires that the tenant has the chance to be heard in court on the grounds for termination of tenancy. The revised listing of due process elements in the HUD rule now starts with the most general and fundamental proposition, that under the State court procedures the tenant must have:

> the *opportunity for a hearing* on the existence of serious or repeated lease violation or other good cause reasons for eviction * * * *" (emphasis supplied)

The other due process elements listed in the rule are all fundamental elements necessary to secure the opportunity for a hearing. For example, notice is a practical prerequisite of the opportunity to be heard (see *Greene v. Lindsey*, 456 U.S. 444, 449–50, 102 S. Ct. 1874, (1982)). Thus the other due process elements are separately listed because they are key elements inherent in the opportunity for hearing.

In the final rule, the requirement for "hearing before an impartial party" is separately listed as a distinct due process element to stress that the requirement for decision by an "impartial" party is a key prerequisite in affording the opportunity for a hearing.

3. Determination Applies to Specific Eviction Procedures

HUD's due process determination is for *specific eviction procedures*—a set of procedural requirements for eviction under State law.

The PHA does not have to give a grievance hearing on termination or eviction if HUD determines "*specified procedures* for judicial eviction under State and local law" (definition of "due process determination" in § 966.2) require a pre-eviction hearing containing the elements of due process. The rule states (§ 966.41(c)(2)(ii)) that a HUD due process determination must describe "the specific eviction procedures which are covered by the due process determination".

If HUD issues a due process determination, the PHA may exclude grievances concerning termination of tenancy or eviction from the PHA administrative grievance procedures (§ 966.41(a)(1)). In the final rule, HUD adds a new provision to clarify that the PHA may only evict the tenant without a grievance hearing, if the PHA uses the specific procedures which are the subject of a HUD due process determination. The rule provides (§ 966.41(a)(2)):

> If HUD issues a due process determination, the PHA may evict the occupants of a dwelling unit through the specified procedures for judicial eviction which are the subject of the determination. The PHA is not required to give notice of proposed adverse action concerning a termination of tenancy or eviction, and is not required to provide the opportunity for a hearing under the PHA's administrative grievance procedure. Unless

> the PHA uses the specified eviction procedures which are the subject of a due process determination, the PHA may not evict the occupants without providing to the Tenant the opportunity for an administrative grievance hearing * * * prior to eviction.

4. HUD Review Is Limited to Legal Requirements for Eviction

The due process determination by HUD under the 1983 law is not based on HUD's investigation of the empirical workings of the State judicial process for eviction of a tenant. The question for HUD under the 1983 Federal law is whether State law in the PHA jurisdiction "requires" a pre-eviction due process hearing (U.S. Housing Act of 1937, section 6(k), 42 U.S.C. 1437d(k)).

Comment on the July 1986 proposed rule states that HUD's due process determination should not be restricted to an examination by HUD of requirements for eviction under State law. Comment asserts that HUD's due process analysis should also consider actual operation of the local landlord-tenant courts. Comment alleges that State judges are not familiar with Federal law, and are not concerned with the Constitutional rights of poor people. Comment states that because of the volume of eviction cases in local landlord-tenant court, tenants do not get a fair hearing. To carry out the 1983 statute, HUD's review may not be based on a formal review of State law on paper, but not in practice.

Comment on the December 1982 rulemaking also claims that the practical operation of State court eviction procedures denies the tenant a fair hearing. The tenant may not receive a due process hearing because of such factors as lack of capability or bias of the judges, refusal or failure by judges to recognize or understand Federal law or Federal defenses concerning a public housing tenancy, rushed hearings, and chaos in local landlord-tenant courts.

Like the July 1986 proposed rule, this final rule provides that HUD's due process determination is only a determination of whether basic due process is required by local law. The HUD due process determination under this rule will examine legal requirements governing operation of the eviction process under State law. HUD will not examine how the local court processes work in practice.

First, HUD's statutory role is only to examine what eviction procedures are required by State law. The 1983 law does not imply that the Department should or must enter into an examination of practices in the local landlord-tenant court, rather than an examination of what State law requires in the jurisdiction of the PHA.

Second, it is not practicable for HUD to ascertain uniformly or with assurance the actual functioning of the eviction process under State law in PHA jurisdictions all over the country. In many or most jurisdictions, reliable studies or information on how the courts work may not be available. At a minimum, researching the operation of the local courts would impose a great cost and administrative burden on HUD offices, a burden not required or contemplated under the 1983 law.

Third, extending the scope of the HUD due process determination to cover empirical operation of local eviction courts would undoubtedly cripple implementation of the statutory authority to exclude termination and eviction from a PHA's grievance process. The need for HUD to gather factual information on operation of local courts would prevent or greatly delay issuance of the statutory due process determinations. This result would frustrate implementation of the statute, and deny the benefits of the PHA's direct access to judicial eviction process in accordance with the 1983 law.

Fourth, if the practical operation of State judicial process does not comply with State law, the remedy should be directed to correction of the judicial process. The remedy for defects in court process does not lie in requiring the PHA to afford an administrative hearing to cure defects in the State court proceeding.

Comment states that HUD should require that State judicial boards educate local court judges on good cause for eviction of public housing tenants. It is HUD's view that this proposal entails an unacceptable and impractical Federal intrusion in administration of the local courts, and is not HUD's proper role in implementing the 1983 law. Under the Federal Constitution, State courts are bound to issue decisions which comply with Federal law, including the Federal statutory good cause requirements for eviction of a public housing tenant. Pursuant to HUD's function under the 1983 law, HUD will determine whether State law requires that the tenant be given the opportunity for a pre-eviction hearing on Federal good cause grounds for eviction.

5. Defects of State Eviction Process

a. Court Orders Which Deny Due Process Hearing. Comment states that before HUD makes a due process determination HUD should consider not only the specific judicial procedures for eviction, but also "authority" of the trial court to issue orders which deprive the tenant of a due process hearing. This comment misconceives the role of the Department in making the due process determination under the 1983 statute and this rule.

To carry out the 1983 statute, HUD will have to analyze due process adequacy of many local eviction procedures. In making the determination, HUD will consider whether *under State law* requirements the specific eviction procedures must be carried out in accordance with all the elements of due process. The State-law requirements are not necessarily located in the State landlord-tenant statutes or in the State rules for the landlord-tenant courts, but may proceed from a variety of sources, including the due process clause of the State Constitution.

State law is binding upon the State judge in the eviction proceeding. Where it appears upon HUD examination of State law that due process (i.e., all the elements of due process as defined in the HUD rule) must be provided before eviction, then HUD may issue the due process determination. In this instance, by hypothesis, the State judge has no "authority" to issue an order that deprives the tenant of due process. The issuance of such an order would be a violation of State law.

Assume, by contrast, that so far as State law is concerned, the State judge has legal authority to issue an order that infringes on one of the elements of due process—that such an order is not a violation of State law (whether or not the order violates Federal due process under the Fourteenth Amendment). Then in this instance, also by hypothesis, State law does not require a hearing which provides all the elements of due process. HUD may not issue a due process determination allowing the use of specific State law eviction procedures in circumstances where the judge has legal authority under State law to issue an order that violates the elements of due process. In the HUD due process determination, the question is not whether a State judge may *in fact* or *in practice* issue an order which infringes due process, but whether the order is a violation of State law.

b. PHA Use of Eviction Procedures Not Covered By Due Process Determination. When a PHA or other owner wants to evict a tenant, State law may proffer a menu of possible ways to evict the tenant. Some procedural avenues may satisfy all elements of due process. Other procedures may be wanting. The due process determination, and therefore the PHA's right to evict without giving the tenant an administrative grievance hearing, applies if HUD has determined that the specific procedures used by the PHA provide the elements of due process (§ 966.41(a)(1)).

Comment proposes that the lease should recite HUD's permission [due process determination] for the PHA to exclude eviction from the PHA's grievance procedure, and should also set out any limitation on the HUD permission. Comment states that if HUD has only authorized the PHA to use a particular judicial procedure, and does not permit the PHA to use other criminal or summary proceedings, the lease should list what procedures may not be used. The restrictions on what eviction procedures may be used should be stated in the lease, so that State courts will respect the limitations of HUD's due process determination.

HUD has not adopted the proposal to list in the lease eviction procedures which may not be used. The proposal will not produce substantial benefits for tenants, will be a nuisance for the PHA, and may limit the opportunity of the PHA for direct recourse to State eviction procedures that meet the requirements of due process. Even if the regulatory requirements for exclusion are not stated in the lease, the requirements are binding on the PHA in State court as a matter of Federal law. The obligation of the PHA to follow the HUD requirements does not depend on contractual incorporation in the lease.

When the PHA seeks to evict the tenant in State court, the tenant may claim that the PHA has not satisfied the Federal requirement for exclusion. This contention may be raised in the eviction proceeding, or in any other judicial procedure which is available to challenge the right of the PHA to proceed with the eviction. There is no reason to believe that the Federal defense cannot be effectively asserted in whatever proceedings may be brought in the State courts (cf., *Thorpe* v. *Housing Authority*, 393 U.S. 268, 284, 89 S. Ct. 518, 527 (1969)). There is also no reason to believe that State courts would be more likely to follow Federal law restrictions on a PHA's authority to evict without providing a grievance hearing if the restrictions were stated in the lease.

If accepted, the proposal would impose a burdensome requirement for a negative listing of all those eviction processes for which HUD has not made a due process determination. A complete listing of eviction processes that cannot be used may be difficult and subject to argument. By design, the HUD procedures to carry out the 1983 statute focus instead on a more precise and positive determination—whether the PHA is evicting through specific processes for which HUD has made a due process determination.

A public housing lease should not be encumbered with a statement of the specific State court procedures that may be used by the PHA for eviction of the tenant. State law procedures may change from time to time during the course of the tenancy. HUD may also issue new due process determinations. A requirement to incorporate in the lease a listing of the eviction procedures approved by HUD at the time of initial lease execution is excessively rigid, and not at all necessary for protection of the tenant.

c. PHA Use of Multi-Tier Eviction Procedure. Some States have a multi-tier judicial eviction procedure which provides a summary process in the initial stage, with subsequent opportunity for rehearing. Comment poses the possibility that in a two tier system, the State may provide an inadequate summary process in the initial phase, followed by a due process hearing in the second phase. The comment states that a PHA should not be able to rely on procedural protections in the second tier of the State proceeding to cure deficiencies in the initial stage. The comment states that if a PHA wishes to exclude eviction from the grievance process, the PHA must bypass procedurally inadequate summary process. The PHA should be required to file directly in a higher level court which provides a due process hearing.

HUD will not prohibit the PHA from using any eviction process available under local law and procedure, on the ground that some segment or phase of the local process does not contain the elements of due process. That is not the proper role of the HUD requirements for exclusion of termination and eviction from the PHA's administrative grievance procedure. The purpose of the exclusion requirements is to assure that the tenant has a legal right under State law to a due process hearing in court before the tenant is evicted. The purpose is not to impose a HUD procedure on the State proceeding prior to eviction, or to prohibit a State from using certain kinds of pre-eviction procedural sequences. The attempt to define or limit pre-eviction procedures would entangle HUD in a thicket of local eviction practices, and interfere with local prerogatives to determine the incidents of the proceedings leading to dispossession of a tenant.

To implement the 1983 law, HUD's task is to determine what pre-eviction court procedures require the elements of due process, not to determine what procedures are best. If the PHA does not use the specific eviction procedures for which HUD has made a due process determination, the PHA must offer a grievance hearing before evicting the tenant (§ 966.41(a)(2)). If the PHA uses the specified procedures covered by a due process determination, the PHA may evict without providing the prior opportunity for an administrative grievance hearing (§ 966.41(a)(2)). For this purpose, there is no need to determine at what stage of judicial process prior to eviction tenant has been given the opportunity for a hearing which comports with due process, or to prohibit the use of certain pre-eviction judicial processes.

However, in a two tier eviction process, a PHA will have a practical incentive to bypass—if possible—use of local procedures for which HUD has not made a determination of due process. If the first summary phase does not afford due process as determined by HUD, the PHA will not be able to evict on the basis of the judicial decision in the first phase. Therefore, where allowed under local law, the PHA will probably choose to file directly in the higher level court that provides a due process hearing.

Finally, we do not assume that summary process is not due process. In *Lindsey* v. *Normet*, the Supreme Court sustained State summary eviction proceeding against a due process challenge.

6. Relation Between HUD Review and Judicial Function

Comment contends that the 1983 law unwisely allots to HUD an essentially judicial function. The comment objects that the law allocates to the executive (HUD) an examination of whether legislative determinations are Constitutionally sufficient. This task is assigned to the judiciary by the Constitution, and is limited to actual cases and controversies. The comment observes that:

> Congress has assigned this critical and intrusive examination of state laws and judicial procedures to HUD's sole discretion. In so doing, Congress has made a mistake which it should rectify forthwith. If not an overtly unconstitutional delegation, this is surely a remarkably awkward mandate.

HUD's role is to carry out the law passed by the Congress, not to second-guess the policy of the law. The 1983 law is not an unconstitutional delegation of judicial powers, and does not infringe on the jurisdiction of the courts to decide whether an eviction complies with procedural due process in an actual case or controversy. Executive branch agencies are often called to consider Constitutional issues in order to execute the laws of the United States. In examining due process adequacy of State procedures, HUD carries out a role explicitly assigned to HUD by the Congress.

In performing the role assigned by the 1983 statute, HUD will seek to determine whether State law *on its face* lacks some requisite of basic due process. This inquiry solely bears on the question whether a PHA may bypass administrative grievance proceedings for eviction of the tenant, and proceed directly to eviction of the tenant in State court.

In the judicial eviction proceeding, a tenant may claim that State procedures generally do not satisfy due process or that the procedures violate due process as applied to the particular case. This is a new due process inquiry in the State court, and is not affected or limited by the HUD due process determination. The purpose of the HUD due process determination under the 1983 statute is merely to satisfy a threshold question—whether the PHA has a Federal *statutory* duty to afford a prior administrative hearing. Once this threshold is passed, the eviction court has the same powers to address Constitutional due process issues in the eviction case as in any other case.

In *King* v. *Housing Authority*, 670 F.2d 952, 955 (11th Cir. 1982), the Eleventh Circuit upheld the old lease and grievance rule, which allows a PHA to bypass the administrative grievance procedure if State law requires a due process hearing in court. The *King* court concluded that the HUD regulation did not infringe on the Constitutional responsibility of the State courts to determine due process issues.

> * * * this case does not involve an attempt by HUD to impose its definition of due process on state courts. [T]he HUD regulations in no way purport to dictate the elements of due process which the state courts must provide in eviction proceedings. The regulations simply say that if state law does not require certain elements of due process in eviction proceedings, the Housing Authority cannot deny the tenant an administrative grievance hearing prior to initiating an eviction action in state court.

The statutory requirement for a HUD due process determination does not limit the opportunity for the State courts to address Constitutional issues in a judicial eviction trial. The statutory requirement under the 1983 law is an additional procedural protection for the tenant—a statutory pre-condition for the ability of the PHA to evict the tenant without giving the opportunity for an administrative grievance.

D. How HUD Makes a Due Process Determination

1. Elimination of Two-Step Process for HUD Due Process Determination

a. Description and Purpose of Proposed Two-Step System. In July 1986, HUD proposed to establish a system in which two separate HUD actions would be required before a PHA is allowed to exclude eviction cases from the PHA's administrative grievance process. In the first step of the proposed process, HUD issues a determination that specified eviction procedures require a due process hearing before eviction. In the second step, a PHA requests authorization to exclude evictions using those procedures from the PHA's administrative grievance process.

The first step of the proposed process was designed by HUD to make it easier for HUD to make a due process determination on legal factors affecting many PHAs. HUD could make a single determination on due process adequacy of eviction procedures which apply to many PHAs in a State.

The second step of the proposed process was intended as a final check, an occasion for HUD to consider whether a due process determination is applicable for the eviction procedures to be used by the individual PHA which is asking authorization to exclude. HUD could consider any local legal factors or peculiarities relating to due process adequacy of the eviction requirements in the jurisdiction of the individual PHA.

b. Public Objections to Proposed Two-Step Process—(1) General Character of Objections. Public comment objects to different aspects of the proposed two-step process for a due process determination. In general, comment generated by legal aid offices seeks to make the process for exclusion of eviction grievances as slow and difficult as possible, while PHA-generated comments are interested in making the process as easy and quick as possible.

Like the PHAs, HUD believes that the rule should facilitate due process determinations under the 1983 statute. The process must not, however, compromise HUD's statutory responsibility to carry out due process determinations in full accordance with the 1983 law, after rendering a careful due process analysis of State eviction requirements.

(2) PHA by PHA Determination Is Not Required by 1983 Law. The proposed rule provided that where HUD has *already determined that specific eviction procedures provide the basic elements of due process before eviction*, HUD has sixty days to respond to a PHA request for authorization to exclude. If HUD fails to respond by the end of this period, the PHA request for authorization is deemed granted. Legal aid comment alleges that this procedure evades HUD's statutory responsibility to determine due process adequacy of State procedures. Comment asserts that the grievance process is required by law unless HUD makes an affirmative decision on the exclusion request of *each individual PHA*.

By contrast, PHA comment states that a PHA should not be required to ask HUD for approval to exclude if HUD has already determined that State eviction procedures provide basic due process. Under the 1983 law, HUD is only responsible for determining due process adequacy of eviction procedures. The PHA should be responsible for deciding whether to exclude. Comment points out that in some States eviction laws are the same Statewide. It is therefore a waste of time to require PHA by PHA requests for approval to exclude.

There is no question that under the 1983 law HUD must make an affirmative decision on due process adequacy of the State eviction procedure. However, the law does not mandate a two/step process for making the statutory determination, and does not mandate that there must be a separate determination for each individual PHA. The statute is entirely silent on how HUD is to go about making a determination that a jurisdiction requires a hearing with the basic elements of due process. The Department has complete discretion to define the incidents of a procedure to implement the statute.

In the proposed rule, the automatic authorization to exclude if HUD does not respond in sixty days solely applies if HUD has already made an affirmative due process determination pursuant to the 1983 law. The PHA is only authorized to exclude when using the specific eviction procedures for which HUD has made the statutory determination. If a PHA instead uses other local eviction procedures, for which HUD has not yet made a statutory due process determination, the PHA is not authorized to exclude (even if the eviction procedures required by State law require a pre-eviction hearing with the basic elements of procedural due process). The proposed procedure for the HUD due process determination was therefore in full accordance with the 1983 law.

Under the final rule, the PHA may only exclude evictions from the PHA's grievance process if HUD has issued a due process determination on the request of the individual PHA. The PHA is never authorized to exclude if HUD has not responded to the PHA's request (§ 966.41).

c. Elimination of Two-Step Process. HUD has decided to promulgate a simple one-step process to authorize a PHA to exclude eviction from the PHA's administrative grievance procedure. HUD will issue a statutory due process determination at the request of a PHA, and for the specific eviction procedures covered by the PHA request. HUD has collapsed the proposed distinction between the due process determination proper, and the final authorization for PHA exclusion pursuant to the determination.

There is no statutory requirement to issue due process determinations for individuals PHAs, or for HUD to passively await a PHA request before issuing a determination. Legal issues involved in the separate due process determinations for different PHAs in a State may often be substantially or wholly identical. State law may establish uniform eviction procedures that apply anywhere in the State, or for all PHAs operating in certain areas of the State. However, there are substantial advantages to using individual PHA requests to trigger the statutory due process determination by HUD, and to requiring localized PHA by PHA determinations on due process adequacy of available State eviction process.

While eviction requirements may often be the same Statewide, HUD has no prima facie knowledge that this is always and everywhere the case. HUD needs a reliable way to ascertain if there are special features of the eviction process in the jurisdiction of each individual PHA. HUD should have a means to learn whether the eviction procedures defined by State law for the PHA jurisdiction are identical to procedures which apply elsewhere in the State, or else that the procedures which apply elsewhere in the State, or else that the procedures are in some respect different.

Information on eviction procedures in the PHA jurisdiction will be submitted by the PHA when the PHA requests the local due process determination. This information consists of two elements:

(1) Legal analysis or other information furnished by the PHA.

(2) Tenant comments on the PHA request.

HUD can and will make use of legal analysis submitted in connection with requests by other PHAs, as well as HUD's own legal analysis and research. Nevertheless, the information and comments submitted by the PHA are a valuable check on other available information. Local parties are most likely to possess complete and reliable knowledge of local legal requirements.

Under the final rule, a PHA may not bypass the administrative grievance procedure until HUD issues the due process determination at the PHA's request (§ 966.41(a)(2)). There is no exception to this requirement. There is no authorization for a PHA to exclude if HUD does not answer the PHA request in a specified time. Under the law, there must be an affirmative due process determination by HUD, and under the revised rule (unlike the proposed rule) the HUD determination will only be issued when HUD receives a request from the particular PHA (§ 966.41(b)(1)). HUD will try to expedite the due process determinations.

2. PHA Request for Due Process Determination

a. General. A PHA which wants to exclude grievances concerning termination of tenancy or eviction from the PHA's administrative grievance process may request a due process determination from HUD. The PHA submits the request to HUD Field Counsel for the jurisdiction. A request for due process determination may be submitted at any time (§ 966.41(b)(1)).

The PHA request states the eviction procedures under State or local law for which the PHA wants a due process determination (§ 966.41(b)(3)(i)). The PHA must notify public housing tenants that the PHA intends to request a due process determination by HUD (§ 966.41(b)(2)). The PHA submits the tenant and other public comments to HUD (§ 966.41(b)(3)(ii)).

The PHA must submit any legal analysis or information requested by the Field Counsel for issuance of a due process determination (§ 966.41(b)(4)(ii)). The HUD Field Counsel may issue instructions on materials to be submitted to support the PHA request.

b. HUD Approval to Exclude Is Not Required. Under the proposed rule, HUD must make two separate determinations for a PHA to exclude eviction from the PHA grievance procedure: first, a HUD determination that State eviction procedures provide basic due process, and second, HUD approval for the individual PHA to exclude eviction from the administrative grievance procedure. Under the final rule, the HUD due process determination is a single-step process. A PHA requests a statutory due process determination. Once HUD issues the due process determination for the PHA, the decision whether to exclude or not to exclude pursuant to the determination rests with the PHA, and not with HUD. The PHA does not have to ask for HUD approval. The PHA may elect to exclude grievances on all or any terminations, so long as the PHA evicts through procedures covered by the HUD determination.

The proposed requirement for a PHA to ask for HUD approval to exclude was only intended to serve as an occasion for HUD to consider interaction of general State law requirements and any local legal considerations. In the revised procedure under the final rule, a due process determination is issued at the request of the individual PHA. There is no longer need for a separate step to allow for submission and consideration of information on local legal requirements in the PHA's jurisdiction. The PHA submits necessary analysis and information requested by the HUD Field Counsel (§966.41(b)(4)(ii)), and also submits public comments on the proposed due process determination (§ 966.41(b)(3)(ii)). The PHA submission and tenant comment furnish information on characteristics of eviction requirements in the PHA jurisdiction.

The grant or denial of a HUD due process determination is solely based on legal considerations pertaining to due process adequacy of the eviction procedures to be used by the PHA. HUD will not seek to second guess the PHA on the management judgment to take termination of tenancy or eviction out of the PHA grievance process. HUD has no desire or intention to impinge on the PHA's management judgment whether to take evictions out of the PHA grievance process.

c. Initiative for Due Process Determination—(1) Comment—Initiatives By PHA and HUD. Under the proposed rule, HUD counsel could initiate due process determinations, but PHAs would have to specifically request approval to take evictions out of the PHA's grievance process. PHA comment recommends that the HUD Regional Office should take the initiative to review State laws within the Region, and that HUD should eliminate the requirement for a PHA to request authority for exclusion.

Legal aid comment asserts that HUD should not initiate determinations recognizing adequacy of the State process. A HUD due process determination should follow a PHA request for exemption from the grievance requirement. Comment claims that the scheme in the proposed rule is designed to encourage or pressure PHAs to request authorization to exclude. According to the comment, HUD should be strictly neutral on whether PHAs request determinations allowing exclusion from the grievance process.

On the other hand, another legal aid comment states that a PHA should not be permitted to request exclusion until HUD has first determined that State court procedures provide due process for tenants. Thus HUD would presumably take the initiative to make the due process determinations. Following the determinations, HUD could (2) Response—Role of PHA and HUD. Under the final rule, HUD will make a due process determination at the request of a PHA. The PHA furnishes HUD information on eviction requirements in the locality. The PHA must submit any legal analysis or information requested by HUD Field Counsel for issuance of a due process determination, including legal analysis of local eviction requirements. The PHA must also furnish to HUD public comments on the local eviction procedures (so long as the comments are received by the PHA within thirty calendar days after notice to the tenants).

The PHA submission may furnish significant insights or information on local legal considerations that might be missed in a wholesale examination by HUD of eviction requirements under State law. For this reason, HUD will not make a due process determinations for a PHA's jurisdiction exclusively at HUD's own initiative, and without receiving a request from the PHA.

However, HUD field counsel may take the initiative to research and analyze State eviction procedures, or to encourage PHAs or PHA groups to submit information and opinions on State eviction requirements. Such broad initiatives by HUD counsel can lay the groundwork for efficient and expeditious consideration of individual PHA requests for due process determinations under the 1983 law.

The statute and rule do not require HUD to passively await the receipt of a PHA request for a due process determination. HUD may properly initiate action to facilitate and encourage the process leading to HUD due process determinations in accordance with the 1983 law. The exclusion of eviction cases from a PHA's internal grievance process under this law may produce substantial management benefits in administration of public housing projects for the benefit of public housing tenants.

Ultimately, however, the choice to request a due process determination under the rule lies with the PHA. Under the rule, HUD cannot force the PHA to request the determination, or to bypass the administrative grievance procedure after the determination is made. The election to exclude is properly left to the local autonomy and discretion of the PHA.

If a PHA decides to request a due process determination, HUD has independent responsibility to make the statutory determination on due process adequacy of State procedures. These HUD determinations will be rendered objectively, based on HUD's judgment of whether State law requirements meet the elements of procedural due process.

d. PHA Submission of Request—A PHA submits the request for a due determination to HUD field counsel. The request may be submitted at any time. (§ 966.41(b)(1).) The request for a due process determination must (§ 966.41(b)(3)):

> (i) State the specific eviction procedures under State or local law for which the PHA is requesting a due process determination.
>
> (ii) Certify that the PHA has given required general notice to Tenants * * *. The PHA shall furnish to HUD copies of all written public comments on the PHA request which are received by the PHA within 30 calendar days of notice to the Tenants.

In addition, the PHA must submit "any legal analysis or information requested by the HUD Field Counsel for issuance of a due process determination" (§ 966.41(b)(4)(ii)). The request for a due process determination must be submitted "in the form required by HUD Field Counsel" (§ 966.41(b)(4)(i)).

To expedite the legal determinations by HUD, the rule leaves maximum flexibility for practical local arrangements between HUD field counsel and PHAs. State law often establishes common legal requirements for eviction, which apply to more than a single PHA. Some requirements may apply everywhere in a State, such as a Statewide landlord-tenant act. PHAs should not have to make duplicative submissions on common legal requirements, and HUD counsel should not have to repeat from scratch the same analysis of common legal issues. The rule therefore does not impose detailed and mechanical requirements for all PHAs to submit specific legal materials. The rule also does not require duplicative or unnecessary submissions by PHAs. Instead, the regulation broadly defines the due process elements which will be considered by HUD on a PHA's request for a due process determination. Field counsel in each area will determine the types of legal materials which must be supplied by a PHA to support a request for HUD's due process determination.

To facilitate due process determinations, PHAs may wish to arrange for coordinated submission of necessary legal materials and legal analysis to HUD, or for common representation on issues in connection with the due process determination. Such common submissions or representation could be arranged by groups of PHAs or by PHA organizations. The rule provides (§ 966.41(b)(4)(ii)):

> To avoid the need for duplicative submissions of relevant materials affecting more than one PHA, PHAs may arrange for consolidated submissions to HUD Field Counsel.

(2) Public Inspection of PHA Submission. The PHA must make available for inspection and copying by any person copies of the PHA request for a due process determination, and of the materials submitted to HUD in support of the PHA's request for a due process determination (§ 966.41(b)(5)).

In answer to public comment, the final rule adds an explicit statement that the PHA must allow public copying of the materials submitted by the PHA.

e. Tenant Comment on PHA Request—(1) Regulation. The final rule gives opportunity for tenant notice and tenant comment before HUD makes a due process determination. Federal law does not require that HUD ask for tenant comment on a proposed due process determination. However, information from tenant comments can help HUD decide whether State law eviction procedures comply with due process.

The rule provides that before requesting a due process determination, a PHA must ask for comments from tenants in the PHA's public housing program (§ 966.41(b)(2)):

> A PHA shall give Tenants in the PHA's [public housing] program reasonably effective general notice that the PHA intends to request a due process determination. The notice shall identify the eviction procedures for which a due process determination will be requested, and shall invite Tenant and other public comment on the proposed determination.

When the PHA requests a due process determination, the PHA must certify to HUD that the PHA has given the required notice to public housing tenants. The PHA must give HUD copies of all written public comments received within thirty calendar days of notice to the tenants (§ 966.41(b)(3)(ii)).

(2) Notice—How and To Whom Given. The rule does not require individual notice to each tenant or family. The rule also does not require any set procedure for giving notice to project tenants. The PHA must use a process that gives "reasonably effective

general notice" to public housing tenants that the PHA intends to request a due process determination (§ 966.41(b)(2)). The notice must be given "through means determined by the PHA (e.g., posting in project offices, notice to Tenant organizations, or notice to individual Tenants in the program)."

HUD does not adopt a public recommendation that notice should be mailed or delivered to each individual tenant. In providing the opportunity for tenant comment, HUD is trying to secure information on eviction laws in the locality. In general, the applicable local laws are the same for all tenants of a particular PHA. Under the rule, the PHA has the authority to decide what notice procedures will be reasonably effective in giving general notice to the tenants.

Under the proposed rule, a PHA would be required to publish notice of the PHA request in a newspaper or other medium of general circulation in the jurisdiction (as well as reasonably effective general notice to families in the PHA program). PHA comment asserts that the PHA should not have to publish notice to the general public. Notice to public housing residents is sufficient.

The final rule eliminates the proposed requirement to publish in a medium of general circulation. Current public housing tenants are the primary universe immediately interested in a due process determination. Publication in a general circulation newspaper is not a necessary or generally effective means of giving notice to public housing tenants. The target of a broader local publication is unclear, and the benefit of such publication is doubtful.

Legal aid comment recommends that the PHA should be required to give notice to tenant organizations and legal aid programs. This proposal is not adopted. The rule does not require that the PHA notify tenant organizations or legal aid organizations. The PHA's notice to tenants is an adequate vehicle to give notice to both tenants and tenant organizations. Notice to the tenants is a reasonable and effective way to get tenant views on local legal requirements before HUD issues a due process determination. In practice, organizations which authentically act for tenants, and which have strong roots and contacts in the tenant community, will learn about a prospective PHA request for a due process determination when the PHA gives notice to the tenants. These organizations can submit comments to the PHA, and the comments must be submitted by the PHA to HUD with the request for a due process determination.

Elimination of Requirement To Publish Notice in "Federal Register"

In this rulemaking, HUD proposed to publish three types of notices in the **Federal Register**: (1) Notice of sixty days for public comment on a proposed HUD determination on State eviction procedures; (2) notice of a PHA request to remove eviction from the PHA grievance procedure; and (3) a summary annual listing of HUD determinations and PHA requests. Provisions for these **Federal Register** notices has been eliminated in the final rule.

On reconsideration, HUD doubts the benefits of national **Federal Register** publication of notices concerning the local due process determination. The requirement to process additional **Federal Register** notices will impose a significant internal administrative burden on the Department, apparently without affording any significant advantage to the public. Any delays in **Federal Register** publication, and any required period for public comment on a proposed determination, will delay the issuance of HUD due process determinations under the 1983 law.

In the nature of the process required under the 1983 law, HUD needs to determine the due process adequacy of the local eviction procedures available to the PHA under State law. National notice in the **Federal Register** is not a necessary, effective or economical means of securing information on eviction requirements in each PHA jurisdiction. **Federal Register** publication is not a good vehicle to furnish notice to public housing tenants. Comment notes that tenants do not receive the **Federal Register** (and indeed most PHAs also do not receive the **Federal Register**). Information on local eviction requirements can be obtained by HUD from materials submitted by PHAs or tenants, or from independent research or other information available to the Field Counsel. Finally, interested parties can readily obtain information on any outstanding due process determinations, either from the affected PHA or from HUD (see § 966.41(c)(3)(iii)).

PHA comment objects to a requirement for local notice to tenants, and asserts that HUD publication in the **Federal Register** is sufficient opportunity for public comment. HUD disagrees. Notice by the PHA to its tenants is a better vehicle to elicit local comment on local procedures than national notice in the **Federal Register**.

(3) Purpose and Use of Tenant Comment. The procedures in the final rule give a reasonable opportunity for tenant comment on the PHA request for a due process determination. HUD rejects comments suggesting that HUD should not ask for public comment. The purpose of the process for soliciting public comment is to help the Department make the due process determinations under the 1983 law and this rule. HUD will consider pertinent tenant or other public comment before issuing a due process determination.

Comments on a proposed due process determination should address the issue to be determined by HUD—whether State law eviction procedures require basic due process before a tenant is evicted. Other issues are not germane. The comment process is not directed to securing views on the PHA's local policy decision to take eviction out of the PHA grievance process.

Some comment on the proposed rule objects to the requirement for a PHA to give local notice of the PHA's request, or find the proposed procedures burdensome. PHA comment states that local notice is best left to PHA discretion.

The Department believes that tenant comment on law in the PHA jurisdiction will be very helpful to HUD in making due process determinations. Comments can give HUD valuable information on legal requirements for eviction in a State or a PHA jurisdiction. By requiring that public housing residents have an opportunity to comment on the PHA request for a due process determination, HUD has a better chance of getting full and balanced information on legal requirements for eviction under State law. Obviously, public housing tenants have a powerful and legitimate interest in whether a PHA can evict the tenant in State court without giving the opportunity for a PHA grievance hearing.

Direct notice by a PHA to the tenants is a good way to assure that the PHA's tenants know that the PHA is asking HUD for a due process determination. Local notice will induce comments by tenants and tenant representatives.

The PHA submits tenant comments to HUD. The final rule does not adopt a recommendation that tenant comments should be submitted directly to HUD. While the regulation does not prohibit tenants from sending comments to HUD, the PHA can readily package tenant comments with the PHA's request for a due process determination. Materials related to HUD's due process determination will be easier for HUD to handle if contained in a single PHA submission, which includes tenant comments and any PHA responses to the tenant comments. Bundling tenant comments in the PHA submission does not compromise the integrity of the comments. Comments must be submitted to HUD as received by the PHA.

The PHA must certify to HUD that the PHA has given the required notice to tenants in the PHA program, and must send HUD copies of written comments received within thirty calendar days after completion of notice to the tenants. Thus, the PHA request may be submitted to HUD after completion of the thirty day notice period (§ 966.41(b)(3)(ii)). HUD does not require, as recommended by comment on this rule, that the PHA continue to submit to HUD public comments on the PHA's request for due process determination which are received by the PHA until HUD grants the PHA request. HUD will receive comments and information from the public at any time, even after a due process determination is issued, but does not think that the regulation should minutely regulate alternative scenarios for PHA submission of local tenant comments.

3. HUD Examination of State Eviction Procedures

a. Flexible Procedure for HUD Determination. The rule establishes a flexible framework for HUD to make the statutory due process determination on adequacy of eviction procedures required under State law. There may be a great variety of legal procedures and legal authorities governing eviction in different States and PHA jurisdictions. There may be many local or special factors affecting HUD's ability to issue a due process determination for a specific set of eviction procedures under State law.

To minimize delay and administrative bottlenecks, HUD has decentralized the authority to make the statutory due process determination by HUD. The determinations will usually be made by HUD field counsel, in the HUD offices responsible for day-to-day administration of HUD's functions in the public housing program. This process will be conducted under the direction of the HUD Regional Counsel in each HUD Region, with oversight by the HUD General Counsel. Under the rule, the HUD field lawyers have considerable room to work out efficient procedures for analysis of State legal requirements for eviction of a tenant.

b. Examination of Local Law. To make a due process determination, HUD field counsel will consider relevant information on legal requirements governing procedures for eviction in a PHA's jurisdiction under State law (§ 966.41(c)(1)). All available sources of law or legal authority may be considered, including the State Constitution, State or local laws and ordinances, State or local regulations, court rules and court decisions, and opinions of a State attorney general.

Comment urges that HUD's determination should be based on independent and thorough analysis of State law by HUD counsel. HUD agrees. HUD will carefully review probative legal sources to determine, for the specific eviction procedures which are the subject of the requested due process determination, whether State law comports with basic due process.

In this endeavor, HUD will consider tenant or other public comments, and legal materials and analysis submitted by the PHA. HUD may also make use of information gleand by HUD legal research, or other relevant legal materials available to HUD.

Comment urges that the rule should instruct HUD field counsel to cooperate with tenants and tenant representatives, and should specify that HUD must give equal consideration to submissions by tenants and the PHA. The comment reflects a fear that the HUD analysis will be tilted toward PHA interests. The comment reflects a deep misunderstanding of HUD's position. HUD is primarily concerned that each HUD due process determination must result from a conscientious, scrupulous and accurate analysis of eviction requirements under State law.

HUD respects and will respond to the desire of PHAs for smooth and expeditious issuance of due process determinations. However, the weight of comments or analysis submitted to HUD depends on the intrinsic force of the legal arguments, not on whether the arguments are submitted by the PHA or by tenants. In making due process determinations, HUD will objectively carry out the role assigned to HUD by the 1983 law. The rule adequately states the elements and procedures for a due process determination by HUD.

Comment states HUD should hold administrative hearings before issuing due process determinations, and asserts hearings are necessary if there are substantial questions on whether the PHA follows the eviction procedure recognized by HUD.

The recommendation is not adopted. Before HUD issues a due process determination, there is no procedure recognized by HUD. Consequently there is no need for a hearing to determine whether the PHA is following the HUD recognized procedure. Once the HUD determination is issued, the PHA may only bypass administrative grievance process when using the procedure recognized by HUD.

HUD believes that formal administrative hearings on a proposed due process determination would be cumbersome and time-consuming, and would not improve the quality of the HUD determination. The due process determination is not designed to determine issues of fact, but issues of law—namely whether State law mandates a due process hearing in advance of eviction. For this purpose, HUD does not need public testimony on the facts. HUD needs information on State law.

Information on State law can be efficiently gathered without a structured hearing process for gathering testimony and other evidence. The regulation provides a flexible procedure for obtaining and considering all available information and views on State law. The procedure is open to submission of relevant legal materials by anyone at any time. There is no reason to believe that structuring the process as a "hearing" would obtain better or more complete information, or would result in better-founded decisions by HUD. In the administration of Federal programs, administrative agencies are often charged with making important determinations to carry out a statutory scheme. It does not follow that the process for making any determination required by law should be structured as a hearing—that is a structured public process for the submission and consideration of testimony and other evidence bearing on the determination.

It is important to remark that the HUD due process determination does not determine whether any particular tenant is evicted from a unit. After HUD issues the determination, the PHA may proceed to evict the tenant by judicial process. In the judicial eviction process, the tenant has the Constitutional right to a hearing, to determine whether the tenant has a right to remain in the unit. In the judicial hearing, the State court can consider both issues of fact and issues of law which bear on the eviction.

4. Due Process Determination by HUD

a. Statement of Due Process Determination. When HUD decides to issue a due process determination on request from a PHA, HUD will give the PHA a statement of the determination. The final rule provides (§ 966.41(c)(2)) that the statement must include:

(i) The name of the PHA.

(ii) A description of the specific eviction procedures covered by the due process determination (such as eviction actions brought in a particular local landlord-tenant court).

(iii) A statement that HUD has determined that the procedures provide the elements of due process prior to eviction.

(iv) A statement which summarizes the legal basis for HUD's due process determination. The statement will briefly describe the basis for HUD's conclusion that the procedures meet each of the due process elements.

b. Revision or Withdrawal of Due Process Determination. At any time, HUD will receive information relevant to a due process determination, including a due process determination previously issued (§ 966.41(c)(1)). HUD may revise or withdraw a due process determination at any time § 966.41(c)(4)(i)). Such action may be based on any available information which is relevant to the determination, including any changes in applicable State law or any court decisions since the original due process determination.

A change in a due process determination may be appropriate because of new court decisions or a change of State or local law since the original determination. Other information or new analysis could justify re-opening a prior determination.

The final rule adds a provision that if HUD decides to revise or withdraw a due process determination, HUD will give the PHA a statement of the decision. The change is effective immediately when the statement is given to the PHA. (§ 966.41(c)(4)(ii).)

Comment recommends that the rule should state that HUD retains the power to review a prior determination that State law satisfies due process, and should further state that affected parties have a right to reconsideration. The proposed rule and the final rule directly recognize that HUD may revise or withdraw a due process determination. HUD does not, however, agree that the rule should create a "right" to reconsideration. HUD will decide whether a request for reconsideration, or a submission of new information on State law procedures justifies reopening a due process determination. The issue is properly left to HUD's administrative discretion.

c. Copies of Due Process Determination. At the request of any tenant, the PHA must make available for inspection and copying copies of the due process determinations issued by HUD for the PHA (§ 966.41(c)(3)(iii)). The HUD Field Office for any jurisdiction must also make available for inspection and copying by any interested person copies of due process determinations for PHAs in the Field Office jurisdiction.

d. Requirement for Decision and Statement of Reasons. Under the two-step process described in the proposed rule (see section VI.D.1 of this Preamble), HUD would first issue the statutory determination that State law procedures afford the elements of due process. A PHA would then separately ask for permission to exclude pursuant to the HUD determination.

Comment objects to proposed provisions allowing a PHA to exclude where HUD has already made the due process determination, but then fails to answer in time a PHA request for permission to exclude. Comment states that HUD should make an affirmative decision on each PHA request, with a written statement of decision and supporting analysis. The HUD analysis should be available to the public.

In the one-step system under the final rule, HUD will issue an affirmative due process determination for an individual PHA. The PHA may not exclude until the determination is issued. As described above, HUD will issue a summary statement of the legal basis for the determination, and the statement may be examined by any interested party.

5. Effect of Due Process Determination

a. Excludion of Eviction From Grievance Process. The rule provides that the due process determination is effective immediately when the statement of determination is given to the PHA by HUD (§ 966.41(c)(3)(i)). After HUD issues a due process determination, the PHA is no longer required to grieve on the decision to evict a family through the eviction procedures covered by the determination. After receiving the determination, the PHA may exclude from the PHA administrative grievance procedure any grievances concerning termination of tenancy or eviction if the PHA uses the specific eviction procedures which are the subject of the determination (§ 966.41(a)(1), 966.41(a)(2) and 966.41(c)(3)(ii)).

If the PHA evicts through eviction procedures covered by the due process determination:

> The PHA is not required to give notice of proposed adverse action concerning a termination of tenancy or eviction, and is not required to provide the opportunity for a hearing under the PHA's administrative grievance procedure. Unless the PHA uses the specific eviction procedures which are the subject of a due process determination, the PHA may not evict the occupants without providing to the Tenant the opportunity for an administrative grievance hearing * * * " (§ 966.41(a)(2)).

b. Other Grievable Subjects. Apart from a proposed eviction, the PHA must grieve on a proposed determination of rent or charges, on a proposed determination to transfer the tenant to another unit, or on other proposed adverse action by the PHA. The PHA must give the opportunity to grieve on these other subjects even if eviction is excluded from the grievance procedure, and the PHA is therefore no longer required to grieve on that subject. For this reason, there is a need to define the relation between the grievance process (for subjects which remain subject to that process), and the judicial process for eviction of the tenant from the unit. It is especially important to determine the relation between a grievance concerning the PHA's determination of rent, and a judicial action to evict the tenant for non-payment of rent.

PHA comment expresses concern that a landlord-tenant court will not order eviction of a tenant for non-payment if the judge knows that the PHA rent determination is the subject of an ongoing and unresolved administrative grievance process. A PHA representative notes that availability of an administrative remedy to contest the rental payment will frustrate the purpose of the authority to exclude grievance cases from the PHA grievance process "by delaying the judicial process/and or by subjecting the parties to the risk of inconsistent outcomes".

HUD shares these concerns. The statute and rule allow a PHA to bypass the administrative grievance process for eviction of a tenant, but only where the tenant has the legal right to a due process hearing in State court. If the PHA chooses to use this exclusion procedure, the judicial action for eviction should not be delayed by a pending grievance process. All outstanding issues involved in eviction of the tenant may be litigated in court. The decision and actions of the court in the action for eviction or the tenant for non-payment of rent or for other grounds should not be delayed or affected by a pending grievance process not decided prior to commencement of the court action, or by a grievance decision rendered after commencement of the action. Once the eviction action is remitted to State court, as contemplated by the 1983 law, the matter should be wholly determined in the State court proceeding, without regard to any parallel grievance proceeding, regardless of whether the grievance process was commenced before or after the commencement of the judicial action.

To evict a tenant, the PHA gives the lease termination notice required by HUD, and any other notices required under State law, including the complaint or other pleading that commences the judicial action for eviction. At the time the PHA serves the notice, the PHA and the tenant may be at any point along the continuum of the grievance process (notice of adverse action by PHA, timely request for grievance hearing by tenant (or failure of tenant to make timely request), decision by hearing officer on tenant grievance). Similarly, the grievance process over the PHA determination of rent or charges may also be unfold during the further progress of the judicial action for eviction of the tenant, through the trial and the decision of the court to grant or deny eviction of the tenant from the unit.

The final rule includes provisions designed to solve problems which stem from the relation between the tenant right to grieve on the PHA's determination of rent or charges or on other grievable adverse action, and the PHA's right to exclude eviction from the PHA grievance process.

First, the PHA may establish deadlines for the tenant to request a change in the PHA determination of rent or other charges (§ 966.31(c)(1)), or to request a hearing after PHA notice of adverse action (§ 966.31(c)(2)). If the tenant fails to submit the request in time, the tenant loses the right for a grievance hearing on correctness of the PHA determination. If the deadline has expired, and if the PHA then brings action to evict the tenant, there is no longer any danger that the judicial process for eviction of the tenant will overlap an administrative grievance process for review of the rent or other determination by the PHA.

Second, the final rule adds a new provision (§ 966.41(a)(4)) stating that where eviction is exluded from the grievance process:

> "In a court action for eviction of the occupants, the PHA is not bound by a grievance hearing decision issued after commencement of the eviction action. The Tenant shall not be entitled to any delay in or continuance of the court action because of a pending grievance hearing proceeding."

These provisions will apply both to cases where a grievance is in process at the time the PHA brings action to evict the tenant (i.e., a hearing was requested, but not decided), and cases where a grievance is brought after commencement of the eviction action, but prior to judgment in the action.

Since the PHA is not required to grieve on the eviction, the tenant may not use the grievance decision as the basis for determination of issues in the eviction action. The tenant has no right to delay the judicial eviction process, and the tenant will not be able to use or abuse the administrative grievance process as a technique to delay the court process for eviction of the tenant. Instead, as intended by the grievance exemption in the 1983 law, the existence or non-existence of grounds for eviction will be wholly determined in the judicial eviction proceeding.

The rule establishes the simple and workable principle that a grievance decision issued after commencement of the eviction action does not affect the determination in the action. This approach avoids the very difficult issues of how to treat grievance decisions issued at different points of the judicial eviction process: e.g., after commencement but prior to trial, during trial, after trial but prior to entry of judgment, after judgment but prior to eviction.

VII. Applicability of Lease and Grievance Requirements; Applicability of Definitions

HUD lease and grievance requirements are located in 24 CFR Part 966. The rule covers two main subjects: tenant leases (Subpart B and Subpart C), and grievance hearings for tenants (Subpart D and Subpart E).

In the 1937 Act, the term "public housing" means non-section 8 housing which is assisted under the Act (U.S. Housing Act of 1937, section 3(b)(1)). The statutory term "public housing" applies to both Indian and non-Indian housing which is assisted under the Act. Under this rule, Part 966 tenant lease requirements (Part 966, Subparts A and B) do not apply to Indian Housing. However, Part 966 grievance hearing requirements apply to both Indian and non-Indian housing.

In the final rule (§ 966.2), there are separate and mutually exclusive definitions of the terms "public housing" and "Indian housing." As defined in the rule, the term "public housing" includes "housing assisted under the U.S. Housing Act of 1937 * * * other than housing assisted under section 8 or section 17 of the U.S. Housing Act of 1937." However, the definition of public housing also explicitly provides that the term "public housing" as used in Part 966 "does not include Indian Housing." As defined in the rule, the term "Indian Housing" means the rental or Mutual Help programs administered by Indian Housing Authorities under Part 905 (the Indian Housing Regulations).

The use of separate and exclusive definitions facilitates a clearer specification of what parts of the lease and grievance requirements are applicable to the HUD Indian Housing Program. The final rule provides that Subparts B (lease requirements) and C (termination of tenancy and eviction) are applicable to "public housing" (i.e., not including Indian Housing) (§ 966.1(b)(1)), and that Subparts B and C are not applicable to "Indian housing" (§ 966.1(b)(2)). The rule also provides that Subparts D and E (grievance hearing requirements) are applicable to both public housing and Indian housing as defined in the rule (§ 966.1(c)).

To exclude coverage of Indian housing, the definition of public housing used in the rule is narrower than the statutory definition of public housing in the U.S. Housing Act of 1937. The use of separate regulatory definitions does not, of course, change the scope of statutory provisions which govern public housing as more broadly defined in the 1937 Act. The lease and hearing provisions in the 1983 law (section 6(k) and section 6(l) of the 1937 Act, 42 U.S.C. 1437d (k) and (l)) apply to all statutory public housing, including Indian housing.

Therefore, although Part 966 Subparts B and C do not apply to Indian housing, the Indian housing regulations contain separate provisions which are consistent with the statutory requirements for leases and termination of tenancy under the 1983 law (U.S. Housing Act of 1937, section 6(l), 42 U.S.C. 1437d(l)). With respect to the Mutual Help Program, the Mutual Help Homeownership Opportunity Agreement in accordance with the existing program rule (Part 905, Subpart D) is in accordance with lease and termination requirements of the 1983 law. With respect to Rental Projects of Indian Housing Authorities, this rule adds a simple statement of lease requirements which implement all requirements of the 1983 law.

Subpart A (§ 966.2) defines terms used in Part 966. The final rule specifies that the definitions apply to the defined terms when used in Part 966 (§ 966.1(a)). The definitions are uniform for all purposes of Part 966.

VIII. Hearing for Applicants

In the December 1982 original rulemaking, the Department proposed to combine provisions regarding informal hearings for applicants and for tenants in occupancy (see discussion at 47 FR 55689, 55691–92, December 13, 1982). In the case of applicants, section 6(c)(3)(i) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(c)(3)(i)) provides that, where the PHA determines that an applicant is ineligible for admission to a public housing project, the PHA must:

> promptly notify * * * any applicant determined to be ineligible for admission to the project of the basis for such determination and provide the applicant upon request, within a reasonable time after the

> determination is made, with an opportunity for an informal hearing on such determination * * *

Enactment in 1983 of the more detailed and demanding statutory hearing requirement for public housing tenants (implemented in this rule) makes it impracticable to combine the regulatory hearing requirements for applicants and tenants. For this reason, the final rule (§ 960.207(a)) separately states notice and hearing requirements for ineligible applicants under section 6(c)(3)(i) of the United States Housing Act of 1937 (42 U.S.C. 1437d(c)(3)(i)).

As noted in the Preamble to the original rulemaking, "the legislative history of the statutory requirement that the PHA provide an informal hearing for applicants determined ineligible for admission strongly indicates that the Congress did not intend to impose an elaborate hearing requirement" (see discussion of legislative history at 47 FR 55689, 55692). In 1983, the bill as reported by the House Banking Committee would have imposed the same administrative grievance procedures for "tenants and applicants" (Report 98–23 on H.R. 1, p. 175). However, the law as finally passed by the Congress (section 6(k) of the U.S. Housing Act of 1937, 42 U.S.C. 1437d(k)) adds new administrative hearing requirements only for tenants, and leaves undisturbed the applicant hearing requirement under prior law.

Comment says PHAs need HUD guidance on informal hearing requirements for applicants. The old rule (§ 960.207(a)) merely repeats the statutory language.

Comment says that a notice that the PHA is denying admission should state the basis for the PHA determination with enough specificity so that the applicant can respond.

The rule requires a PHA to establish a simple but effective procedure to notify an applicant if the PHA decides the applicant is ineligible for any reason (§ 960.207(b)(1)), and to give the applicant an opportunity for an informal hearing on the decision (§ 960.207(b)(2)). These procedures are very similar to the review procedures for applicants to a PHA's certificate program (§ 882.216(a), 49 FR 12215, March 29, 1984; for parallel factors considered by the Department in determining the appropriate level of procedural protection for a subsidized housing applicant, see preamble to rule for certificate program.)

The rule (§ 966.207(a) provides that:

> (1) The PHA shall give an applicant for admission prompt written notice of a decision that the applicant is not eligible for admission for any reason. The notice shall inform the applicant of the basic reasons for the decision. The notice shall also state that the applicant may request an informal hearing on the decision, and shall describe how to obtain the informal hearing.
>
> (2) The PHA shall give the applicant an opportunity for an informal hearing on the decision, in accordance with procedures adopted by the PHA. The hearing shall be held within a reasonable time of the decision. The informal hearing shall be conducted by a person or persons (who may be an officer or employee of the PHA) designated by the PHA in accordance with the applicant hearing procedures adopted by the PHA. The hearing officer shall be someone other than the person who made the decision under review or a subordinate of such person. The applicant shall be given an opportunity to present written or oral objections to the PHA decision. The PHA shall promptly notify the applicant in writing of the final PHA decision after the informal hearing. The notice shall state the basic reasons for the decision.

IX. Civil Rights Requirements.

The final rules adds a provision to affirm that a PHA is bound by civil rights statutes and regulations in administering the lease and grievance requirements. The rule provides (§ 966.3):

> PHA policies and actions with respect to leases and administrative grievance procedures under [Part 966] shall be consistent with Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Executive Order 11063 and with related regulations and requirements.

This rule gives PHAs increased discretion in administering the lease and grievance procedure. However, PHAs are reminded that all applicable civil rights laws and regulations remain in full force. Each PHA's adherence to the civil rights authorities will continue to be monitored by the Department.

In particular, PHAs are cautioned against implementing any policies or practices which have, or may have, the effect of treating individual tenant families differently by race, national origin, sex or religion, or which produce a diparate impact based on these factors.

X. Other Matters

The Department has determined that this rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291. Analysis of the rule indicates that it will not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic or export markets.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implements section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection during regular business hours in the office of the Rules Docket Clerk, at the address listed above.

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act) the undersigned certifies that this rule does not have a significant economic impact on a substantial number of small entities. The lease and grievance requirements are directed to public housing agencies (including Indian Housing Authorities) administering the public housing program, and will reduce the administrative burden of the PHA under the present lease and grievance procedures.

Information collection requirements in this rule have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520). No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number(s), when assigned, will be announced by separate notice in the Federal Register. Estimated public reporting burden for this collection of information is as follows:

(1) Total annual report and recordkeeping burden: 152,373 hours.

(2) Burden per response: .05 hour. (3) Proposed frequency of response: varies.

(4) Estimate of likely number of respondents (annual): 3,300

The rule was listed as Item 1038 in the Department's Semiannual Agenda of Regulations published on April 25, 1988 at 53 FR 13854, 13893 pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance program number and title is 14.146, Low Income Housing Assistance Program (public housing).

List of Subjects in 24 CFR Parts 904, 905, 913, 960 and 966

Public housing.

Accordingly, 24 CFR Chapter IX is amended as follows:

1. Part 966 is revised to read as follows:

PART 966—TENANCY AND ADMINISTRATIVE GRIEVANCE PROCEDURE

Subpart A—General

Sec.
966.1 Applicability.
966.2 Definitions.
966.3 Civil rights requirements.

Subpart B—Lease

966.10 Required lease provisions.
966.11 Prohibited lease provisions.
966.12 Applicability of lease requirements.

Subpart C—Termination of Tenancy and Eviction

966.20 Purpose.
966.21 Termination of tenancy—grounds.
966.22 Notice of lease termination.
966.23 Eviction.

Subpart D—Administrative Grievance Procedure

966.30 Establishment of grievance procedure.
966.31 Grievance on proposed adverse action by PHA.
966.32 Hearing procedure.
966.33 Hearing decision.
966.34 Special provisions for Turnkey III and Mutual Help Projects.
966.35 Additional grievance procedures.

Subpart E—Excluding Grievance on Eviction or Termination of Tenancy from Administrative Grievance Procedure

966.40 Purpose.
966.41 Procedure for HUD determination.

Authority: U.S. Housing Act of 1937 (42 U.S.C. 1437–1437r); section 204 of the Housing and Urban-Rural Recovery Act of 1983, P.L. 98–181, November 30, 1983; section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Subpart A—General

§ 966.1 Applicability.

(a) *Applicability of definitions.* The definitions in § 966.2 apply to the defined terms when used in Part 966.

(b) *Applicability of lease and termination requirements.* (1) Subpart B (lease requirements) and Subpart C (termination of tenancy and eviction) of this Part are applicable to Public Housing (definition at § 966.2).

(2) Subparts B and C are not applicable to Indian Housing (definition at § 966.2) or to the Turnkey III Homeownership Opportunity Program (see Part 904). (For provisions applicable to Rental Projects of Indian Housing Authorities, see § 905.303.)

(c) *Applicability of grievance hearing requirements.* Subpart D and Subpart E of this Part (administrative grievance procedure) are applicable to Public Housing and to Indian Housing (For special provisions for Turnkey III and Mutual Help projects, see § 966.34.)

§ 966.2 Definitions.

Due process determination. A determination by HUD that specified procedures for judicial eviction under State and local law require that a tenant must be given the opportunity for a hearing in court which provides the basic elements of due process before eviction from the dwelling unit.

Elements of due process. The court procedures for eviction under State and local law require all of the following before eviction from the dwelling unit:

(a) The opportunity for a hearing on the existence of serious or repeated lease violation or other good cause reasons for eviction (see § 966.21).

(b) Advance notice of the hearing, and of the alleged reasons for eviction.

(c) Hearing before an impartial party.

(d) The opportunity to be represented by counsel.

(e) The opportunity to present evidence and question witnesses.

(f) A decision on the reasons for eviction before the occupants are evicted.

Eviction. Forcing the occupants to move out of the dwelling unit.

Fraud. Fraud means fraud as defined under any Federal or State civil or criminal statute, or any other deliberate misrepresentation to the PHA by the Tenant or other members of the Household.

Household. The Tenant and other persons who live in the dwelling unit with written approval of the PHA.

Indian Housing. The Mutual Help Homeownership Opportunity Program (which is administered by Indian Housing Authorities under 24 CFR Part 905, Subpart D) and Rental Projects of Indian Housing Authorities (under 24 CFR Part 905).

Public Housing. Housing assisted under the U.S. Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) other than housing assisted under section 8 or section 17 of the U.S. Housing Act of 1937. "Public Housing" includes housing assisted under the Leased Housing programs under section 23 or section 10(c) of the U.S. Housing Act of 1937 as in effect before amendment by the Housing and Community Development Act of 1974. However, Public Housing does not include Indian Housing.

Public Housing Agency (PHA). Any State, county municipality or other governmental entity or public body (or agency or instrumentality thereof) that is authorized to engage in or assist in the development or operation of housing for lower income families. As used in this Part, PHA includes an Indian Housing Authority (as defined at § 905.102).

Tenant. The person or persons who execute the lease with the PHA.

Tenant Rent. The amount payable monthly as rent to the PHA, as defined in, and determined in accordance with, 24 CFR Part 913.

Termination of tenancy. Termination of the legal right to occupancy of the dwelling unit. Termination of tenancy includes a termination of the lease, or a decision not to renew the lease at the end of the lease term.

Total Tenant Payment. The monthly amount defined in, and determined in accordance with 24 CFR Part 913.

§ 966.3 Civil rights requirements.

PHA policies and actions with respect to leases and administrative grievance procedures under this Part shall be consistent with Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Executive Order 11063 and with related regulations and requirements.

Subpart B—Lease

§ 966.10 Required lease provisions.

(a) *Lease.* The PHA and the Tenant shall enter into a written lease of the dwelling unit. The lease shall be in accordance with the requirements of Subpart B and Subpart C. The lease shall contain the provisions described in Subpart B and Subpart C, and may contain other provisions which are determined by the PHA and which are not inconsistent with these Subparts.

(b) *Basic information.* (1) The lease shall state the name of the Tenant, the identification of the dwelling unit leased, the term of the lease, and the persons who will live in the dwelling unit.

(2) The term of the lease may be for a fixed term tenancy or for a periodic tenancy (e.g., month-to-month). In either case, the PHA shall not terminate the tenancy except in accordance with § 966.21.

(c) *Rent.* (1) The amount of the Total Tenant Payment and the Tenant Rent shall be determined by the PHA in accordance with HUD regulations and requirements, and in accordance with PHA policy (see § 966.10(n)(1)).

(2) When the PHA makes any change in the amount of the Total Tenant Payment or Tenant Rent, the PHA shall give written notice to the Tenant. The notice shall state the new amount, and the date from which the new amount is applicable (see § 966.31(c)(1) concerning deadline to ask for a change in the PHA's proposed decision on rent or PHA charges). The notice shall also state that the Tenant may ask for an

explanation of how the amount is computed by the PHA. If the Tenant asks for an explanation, the PHA shall answer the request in a reasonable time.

(3) The lease shall state the services, maintenance, equipment and appliances which are included in the Tenant Rent, and are furnished by the PHA without additional charge to the Tenant. (For treatment of utilities see § 966.10(d).)

(d) *Utilities.* (1) The lease shall state what utilities are included in the Tenant Rent, and are furnished by the PHA without additional charge to the Tenant ("PHA-furnished utilities").

(2) The lease shall state what utilities are not included in the Tenant Rent, and must be purchased by the Tenant from the utility suppliers ("Tenant-purchased utilities").

(3)(i) If there are PHA-furnished utilities, the lease shall provide that the PHA's allowance for PHA-furnished utilities shall be determined in accordance with HUD regulations and requirements (see Part 965, Subpart E).

(ii) If there are PHA-furnished utilities, the lease may provide that the Tenant shall pay surcharges for excess consumption of PHA-furnished utilities. The surcharges are only permissible if the charges are determined by an individual checkmeter which measures utility consumption of the dwelling unit, or if the charges are attributable to occupant-owned major appliances or to optional functions, such as air-conditioning, of PHA-furnished equipment.

(4)(i) If there are Tenant-purchased utilities, the lease shall provide that the PHA's allowance for Tenant-purchased utilities shall be determined in accordance with HUD regulations and requirements (see Part 965, Subpart E).

(ii) If there are Tenant-purchased utilities, and the utility supplier shuts off utilities because of Tenant's failure to pay the utility bill, occurrence of the shut-off shall be considered a serious violation of the lease by the Tenant.

(5) The PHA shall give written notice to the Tenant of any applicable allowance for PHA-furnished or Tenant-purchased utilities. The PHA may change the allowance at any time during the term of the lease, and shall give Tenant written notice of the revised allowance (see § 966.10(n)(1)).

(e) *Charges not included in Tenant Rent; security deposits.* (1)(i) The lease shall state what types of charges the Tenant is required to pay the PHA in addition to Tenant Rent. The lease shall state how the charges will be determined by the PHA (for example, by a schedule of surcharges for excess consumption of utilities, or by a schedule of repair charges). The PHA's schedules or other procedures for determining Tenant charges shall be made available for inspection and copying by the Tenant.

(ii) The PHA shall give the Tenant written notice of the amount of any charge in addition to Tenant Rent, and of when the charge is due (see § 966.31(c)(1) concerning deadline to ask for a change in the PHA's proposed decision on rent or PHA charges).

(iii) The lease may require the Tenant to pay reasonable charges, as determined by the PHA, for damage other than normal wear or tear, caused by Household members, or by guests, visitors, or other persons under control of Household members.

(2) The lease may require the Tenant to pay reasonable fees for late payment of rent or charges determined by the PHA.

(3) The lease may provide for reasonable security deposits determined by the PHA in accordance with State and local law.

(f) *PHA obligations.* The lease shall provide that:

(1) The PHA shall provide services and maintenance for the dwelling unit, equipment and appliances, and for the common areas and facilities, which are needed to keep the housing in decent, safe and sanitary condition.

(2) The PHA shall comply with the requirements of applicable State and local building or housing codes concerning matters materially affecting the health or safety of the occupants.

(3) If the condition of the dwelling unit is hazardous to the health or safety of the occupants, and the condition is not corrected in a reasonable time, the PHA shall offer the Tenant a replacement dwelling unit if available. The PHA is not required to offer the Tenant a replacement unit if the hazardous condition was caused by fault or negligence of Household members, or of guests, visitors, or other persons under control of Household members.

(4) The PHA shall give the Tenant reasonable notice of what certification, release, information or documentation must be supplied to the PHA, and of the time by which any such item must be supplied (see § 966.10(h)(1)(iv) concerning the Tenant's obligation to supply the required item).

(g) *Tenant's right to occupy unit.* (1) The lease shall provide that the Tenant shall have the right to exclusive use of the dwelling unit for residence by the Household. The lease may provide that with written approval of the PHA, members of the Household may engage in legal profitmaking activities incidental to primary use of the dwelling unit for residence by the Household.

(2) With written approval of the PHA, use of the dwelling unit may include care of foster children and live-in care of a member of the Household.

(3) Members of the Household may receive guests or visitors in the dwelling unit. However, such use of the dwelling unit by the Household must be reasonable. The members of the Household shall comply with PHA rules on use of the dwelling unit by guests or visitors.

(h) *Obligations of the Tenant.* (1) The lease shall provide that the Tenant:

(i) Shall use the dwelling unit (A) solely for residence by the Household, and (B) as the Tenant's only place of residence (if approved by the PHA under the lease, members of the Household may engage in incidental profit-making activities in accordance with § 966.10(g)(1));

(ii) Shall not sublease or assign the lease, or provide accommodations for boarders or lodgers;

(iii) Shall comply with any State or local law which imposes obligations on a tenant in connection with the occupancy of a dwelling unit and surrounding premises;

(iv) Shall supply any certification, release, information or documentation which the PHA or HUD determines to be necessary, including submissions required by the PHA for an annual reexamination or interim reexamination of Family income and composition in accordance with HUD requirements; and

(v) Shall move from the dwelling unit in either of the following circumstances:

(A) The PHA determines the Household is residing in a unit which is larger or smaller than appropriate for the Household size and composition under the PHA unit size standards, or determines that the character of the unit is otherwise inappropriate for the Household size and composition (such as a unit modified for use or accessibility by handicapped, which is currently occupied by a Household whose members are not handicapped), or determines that the unit requires substantial repairs, is scheduled for modernization, or is not in decent, safe and sanitary condition, and the PHA offers the Tenant another Public Housing dwelling unit. The Public Housing dwelling unit shall be decent, safe and sanitary and of appropriate size under the PHA unit size standards.

(B) The dwelling unit is hazardous to the health or safety of the occupants. In accordance with Section 966.10(f)(3), the PHA must offer the Tenant a replacement dwelling unit if available.

(2) The lease shall provide that the Tenant and other members of the Household:

(i) Shall not disturb other residents, and shall prevent disturbance of other residents by guests, visitors, or other persons under control of Household members;

(ii) Shall not damage or destroy the dwelling unit or premises, and shall prevent such damage or destruction by guests, visitors, or other persons under control of Household members;

(iii) Shall not engage in criminal activity in the dwelling unit or premises, and shall prevent criminal activity in the unit or premises by guests, visitors, or other persons under control of Household members;

(iv) Shall comply with necessary and reasonable PHA rules, on conduct of Household members, or on use and treatment of the unit and premises by the Tenant and Household. The PHA shall give a copy of the rules to the Tenant (including any changes in the rules);

(v) Shall not commit any fraud in connection with any Federal housing assistance program; and

(vi) Shall not receive assistance for occupancy of any other unit assisted under any Federal housing assistance program during the term of the lease.

(3) The lease shall include a certification by the Tenant that:

(i) The Tenant and other members of the Household have not committed any fraud in connection with any Federal housing assistance program, unless any such fraud was fully disclosed to the PHA before execution of the lease, or before PHA approval for occupancy of the unit by the Household member.

(ii) All information or documentation submitted by the Tenant and other members of the Household to the PHA in connection with any Federal housing assistance program (before and during the lease term) are true and complete to the best of the Tenant's knowledge and belief.

(i) *Crime.* (1) In addition to the provisions required by § 966.10(h)(2)(iii), the lease may provide that any of the following criminal activities by any Household member, on or off the premises, shall be a violation of the lease, or other good cause for termination of tenancy:

(i) Any crime of physical violence to persons or property.

(ii) Illegal use, sale or distribution of narcotics.

(2) The PHA may terminate tenancy for criminal activity (for violation of the lease provisions required by § 966.10(h)(2)(iii), or pursuant to the optional lease provisions allowed by this § 966.10(i)) before or after conviction of the crime.

(j) *Tenant maintenance.* The lease may provide that the Tenant shall perform seasonal maintenance or other maintenance tasks, as specified in the lease, where performance of such tasks by tenants of dwelling units of a similar design and construction is customary; provided, that such provision is included in the lease in good faith and not for the purpose of evading the obligation of the PHA. The PHA shall exempt the Tenant if the PHA determines that because of age or physical disability members of the Household are unable to perform such tasks.

(k) *Entry and inspection.* (1) The lease shall state the purposes for which the PHA may enter the dwelling unit. The purposes may include entry to inspect the unit, to make repairs or improvements, or provide other services, to show the unit, or for other purposes stated in the lease.

(2) The PHA shall give the Tenant at least 24 hours written notice that the PHA intends to enter the unit. The PHA may enter only at reasonable times.

(3) The Tenant shall allow the PHA to enter the unit in accordance with the lease.

(4) If the PHA has reasonable cause to believe that there is an emergency, the PHA may enter the unit at any time without advance notice to the Tenant, and may enter without consent of the Tenant. After such entry, the PHA shall give the Tenant a written notice of when the PHA entered the unit, and the reason for such entry.

(l) *Notice procedure.* (1) The PHA shall adopt a notice procedure which is consistent with State and local law, and which shall be incorporated into the lease. The notice procedure shall state how the PHA and Tenant may give notice to each other concerning termination of the lease, and other matters under the lease.

(2)(i) Notice of lease termination shall be in accordance with § 966.22, and notice of proposed PHA adverse action shall be in accordance with § 966.31(b).

(ii) A notice of lease termination, or a notice of proposed adverse action, shall be given to the Tenant:

(A) By mailing the notice by first class mail addressed to the Tenant at the dwelling unit, or

(B) By handing a copy of the notice to the Tenant or to any adult answering the door at the dwelling unit, or

(C) By other means which the PHA determines to be reasonably likely to give the Tenant actual notice. Posting on the outside of the unit door, and which is not supported by other notice to the Tenant, does not constitute sufficient notice.

(iii) If a notice of lease termination or a notice of proposed adverse action is sent by mail, the notice is deemed given when mailed.

(3) If the PHA believes that the notice procedure otherwise used by the PHA may not give adequate notice to handicapped Tenants, the PHA notice procedure may incorporate additional procedures for giving notice to such Tenants.

(m) *Termination of tenancy and eviction.* The lease shall state the requirements for termination of tenancy and eviction under Subpart C of this Part.

(n) *Changes during lease term.* (1) From time to time during the course of the lease, the PHA may revise the amount of Tenant Rent or of PHA allowances to the Tenant for PHA-furnished or Tenant-purchased utilities. The revised amounts are binding on the Tenant.

(2) From time to time during the course of the lease, the PHA may revise PHA rules. The revised rules are binding on the Tenant.

(o) *PHA offer of lease or revision.* (1) During the lease term, the PHA may offer the Tenant a new lease, or a revision of the lease.

(2) The Tenant is not bound by a new lease or lease revision unless the PHA's offer is accepted by the Tenant.

(3) The offer of a new lease or lease revision shall state that failure to timely accept the PHA's offer is grounds for termination of tenancy. The offer shall state how to accept the offer. The offer may state that the Tenant must accept the lease by a PHA-established deadline which is stated in the offer. Failure to timely accept the PHA offer shall be "other good cause" for termination of tenancy.

(4) For a fixed term lease, at least 60 days before the end of the lease term, the PHA shall give written notice to the Tenant containing either:

(i) The offer of renewal (on the same or revised terms), or

(ii) Notice that the PHA has decided not to renew the lease, including a statement of the grounds, in accordance with § 966.21, for not renewing the lease.

§ 966.11 Prohibited lease provisions.

The following types of lease provisions shall not be included in the lease:

(a) *Agreement to be sued.* Agreement by the Tenant to be sued, to admit guilt, or to a judgment in favor of the PHA, in a court proceeding against the Tenant in connection with the lease.

(b) *Treatment of property.* Agreement by the Tenant that the PHA may take, hold or sell personal property of Household members, without notice to the Tenant and a court decision on the rights of the parties. However, the prohibition of such agreement does not apply to an agreement by the Tenant concerning disposition of personal property remaining in the dwelling unit after the Tenant has moved out of the unit. The PHA may dispose of such personal property in accordance with State law.

(c) *Excusing PHA from responsibility.* Agreement by the Tenant not to hold the PHA or the PHA's agents responsible for any action or failure to act, whether intentional or negligent.

(d) *Waiver of notice.* Agreement by the Tenant that the PHA does not need to give notice of a court proceeding against the Tenant in connection with the lease, or does not need to give any notice required by HUD.

(e) *Waiver of court proceeding for eviction.* Agreement by the Tenant that the PHA may evict Household members (1) without instituting a civil court proceeding in which the Tenant has the opportunity to present a defense, or (2) before a decision by the court on the rights of the parties.

(f) *Waiver of jury trial.* Agreement by the Tenant to waive any right to a trial by jury.

(g) *Waiver of appeal.* Agreement by the Tenant to waive the right to appeal, or to otherwise challenge in court, a court decision in connection with the lease.

(h) *Tenant chargeable with legal costs regardless of outcome.* Agreement by the Tenant to pay lawyer's fees or other legal costs even if the Tenant wins in a court proceeding by the PHA against the Tenant. However, the Tenant may be obligated to pay such costs if the Tenant loses.

§ 966.12 Applicability of lease requirements.

The requirements of Subpart B shall be applicable to any lease executed by a Tenant after [*insert effective date of rule*], including the execution of a revision or extension after that date.

Subpart C—Termination of Tenancy and Eviction

§ 966.20 Purpose.

This subpart states the requirements for termination of tenancy and eviction. The lease shall contain the requirements stated in this part.

§ 966.21 Termination of tenancy—grounds.

(a) *Grounds for termination.* The PHA shall not terminate the tenancy, and shall not evict occupants from the dwelling unit, except for serious or repeated violation of the lease, or other good cause.

(b) *Serious violation of lease.* Serious violation of the lease includes, but is not limited to, the following cases:

(1) The PHA may determine that failure of the Tenant to timely supply to the PHA any certification, release, information or documentation on Family income or composition is a serious violation of the lease.

(2) The PHA may determine that non-payment of Tenant Rent or charges is a serious violation of the lease. In making this determination, the PHA may consider factors relating to impact of such non-payment on PHA administration of the program. These factors may include the amount owed, how much of the amount owed is overdue, costs of collection, effect of non-payment on collection of rents and charges, how long the payment is overdue, or other factors. The PHA may establish a policy for determining what type of non-payment will be treated as a serious violation of the lease.

(3) See § 966.10(d)(4)(ii) concerning treatment of shut-off of Tenant-purchased utilities as a serious violation of the lease.

(c) *Other good cause.* (1) The PHA may only terminate the lease for other good cause (under § 966.21(a)(2)) at the end of a lease term.

(2) A fixed term lease may be terminated for other good cause at the end of the fixed term. A lease for a periodic tenancy may be terminated for other good cause at the end of each periodic term. For example, in the case of a month-to-month tenancy, the lease may be terminated for other good cause at the end of each month.

(d) *Eviction based on income.* For restrictions on eviction of families based on income, see § 960.210.

§ 966.22 Notice of lease termination.

(a) *Notice period.* The PHA shall give the Tenant adequate written notice of a termination of the lease. The period from the date the notice is given to the date of lease termination may not be less than:

(1) A reasonable time, as determined by the PHA, but not to exceed thirty days, when the health or safety of other residents or of PHA employees is threatened. The PHA may establish a policy for determining what is a "reasonable time" in different types of cases.

(2) Fourteen days for nonpayment of rent.

(3) Thirty days in any other case.

(b) *Contents of notice.* The notice of lease termination shall:

(1) State when the lease will terminate. If the date of lease termination is not known, the notice may specify the event by which the lease terminates under local procedures.

(2) State that the PHA may only terminate the tenancy for serious or repeated violation of the lease, or other good cause.

(3) Contain a specific statement of the reasons for lease termination.

(4) State that the PHA may only evict occupants from the dwelling unit through a civil court proceeding in which the Tenant has the opportunity to present a defense, and after a decision by the court on the rights of the parties.

(c) *How notice is given.* Notice of lease termination shall be given to the Tenant in accordance with the PHA's notice procedure under § 966.10(1)(2).

(d) *Relation to rent bill and to other notices*—(1) *Relation to State law notices.* A notice to vacate or other notice under State or local law may be combined with, or run concurrently with, the notice of lease termination under this section. However, the lease shall in no event terminate before expiration of the notice period under paragraph (a) of this section.

(2) *Relation to PHA rent bill.* The PHA rent bill may be combined with a notice of lease termination for nonpayment of rent. The notice of lease termination shall state that the lease will terminate if the rent bill is not paid when due.

(3) *Relation to notice of adverse action.* If termination of tenancy is not excluded from the PHA grievance process pursuant to Subpart E of this Part, the PHA shall also give notice of proposed adverse action in accordance with § 966.31(b)(2)(i)(B). As provided in that section, the notice of adverse action must be given before, or must be combined with, the notice of lease termination.

§ 966.23 Eviction.

(a) The PHA may only evict occupants from the dwelling unit: through a civil court proceeding in which the Tenant has the opportunity to present a defense, and after a decision by the court on the rights of the parties.

(b) The requirement for eviction through a civil court proceeding is binding on the PHA, but is not intended to limit arrest, prosecution or other criminal enforcement activities by Federal, State or local law enforcement authorities against members of the

Household for any crime. The PHA and its officers, employees or agents may act as complainants or witnesses in any criminal enforcement activity, and may cooperate with law enforcement authorities in any criminal enforcement activity.

Subpart D—Administrative Grievance Procedure

§ 966.30 Establishment of grievance procedure.

(a) *Purpose.* Section 6(k) of the U.S. Housing Act of 1937 (as amended by section 204 of the Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98-181, November 30, 1983) provides that HUD shall by regulation require that a PHA establish and implement an administrative grievance procedure concerning any proposed adverse PHA action. Subpart D implements this statutory requirement.

(b) *Establishment of grievance procedure.* The PHA shall establish and implement an administrative grievance procedure for Tenants residing in Public Housing or Indian Housing to provide the opportunity for hearing on any proposed PHA adverse action as described in § 966.31(a)(2).

(c) *Adoption of procedure.* The PHA shall adopt a written administrative grievance procedure in accordance with this Subpart. If a PHA decides to exclude grievances concerning termination of tenancy of eviction from the PHA's administrative grievance procedure (see Subpart E), the administrative grievance procedure shall provide that these grievances are excluded from the procedure.

(d) *Information for Tenant.* (1) The PHA shall provide each Tenant a general written description of the PHA's administrative grievance procedure, including a description of when the PHA is required to provide the opportunity for an informal hearing, and how to request a hearing.

(2) The administrative grievance procedure shall be made available for inspection and copying by any Tenant.

§ 966.31 Grievance on proposed adverse action by PHA.

(a) *Subject and purpose of informal hearing.* (1) The grievance procedure shall provide the Tenant an opportunity for an informal hearing on any proposed PHA adverse action.

(2) Proposed adverse action means any of the following proposed decisions by the PHA concerning an individual Tenant:

(i) A proposed decision to terminate the tenancy, or to evict occupants from the dwelling unit.

(ii) A proposed decision to require the Tenant to move to another dwelling unit (see § 966.10(h)(1)(v) and § 966.10(f)(3)).

(iii) A proposed decision determining:

(A) The amount of the Tenant Rent payable by the Tenant to the PHA or the amount of utility reimbursement by the PHA to the Tenant,

(B) The amount of PHA charges in addition to Tenant Rent (see § 966.10(e)), or

(C) The amount the Tenant owes the PHA for Tenant Rent or PHA charges.

(iv) A proposed decision to take other specific, concrete, and affirmative individualized action contrary to the interests of a Tenant.

(3)(i) The purpose of the informal hearing shall be to review whether the proposed adverse action by the PHA is in accordance with the lease, or with law, HUD regulations or PHA rules.

(ii) PHA action or non-action concerning general policy issues or class grievances (including determinations of the PHA's schedules of allowances for PHA-furnished utilities or of allowances for Tenant-purchased utilities) does not constitute adverse action by the PHA, and the PHA is not required to provide the opportunity for a hearing to consider such issues or grievances.

(4) If the PHA does not conduct a reexamination of Family income and composition: (i) For more than a year after the last examination or reexamination, or (ii) after receiving information concerning a change in Family income or composition between regularly scheduled reexaminations, the PHA's determination of the amount of Tenant Rent payable by the Tenant to the PHA in the absence of a reexamination shall constitute a proposed adverse action under § 966.31(a)(2)(iii)(A). The PHA shall give the Tenant the opportunity for an informal hearing on the PHA failure to conduct a reexamination.

(b) *Notice of proposed adverse action*—(1) *Contents of notice.* The PHA shall give the Tenant written notice of a proposed adverse action. The notice shall:

(i) Contain a specific statement which describes the proposed adverse action, and the reasons for the proposed adverse action.

(ii) State that the Tenant may request a hearing under the PHA's administrative grievance procedure.

(iii) State how to request a hearing, and the deadline for requesting a hearing.

(2) *When notice is given*—(i) *Termination of tenancy.* (A) The occupants shall not be evicted from the dwelling unit until the PHA gives the Tenant notice of proposed adverse action.

(B) For a proposed decision by the PHA to terminate the lease, the notice of proposed adverse action shall be given before, or shall be combined with, the notice of lease termination under § 966.22. If the Tenant makes a timely request for a hearing on the proposed decision, the Tenant shall be given the opportunity for a grievance hearing before expiration of the applicable notice period under § 966.22(a).

(ii) *Requiring Tenant to move.* For a proposed decision by the PHA to require the Tenant to move from the dwelling unit to another dwelling unit, the Tenant may not be required to move until the PHA gives the Tenant notice of proposed adverse action. If the Tenant makes a timely request for a hearing on the proposed decision, the Tenant may not be required to move until the Tenant is given the opportunity for a grievance hearing.

(iii) *Rent or PHA charges.* For a proposed decision by the PHA determining the amount of rent or PHA charges (as described in § 966.31(a)(2)(iii) (A), (B), or (C)), the PHA may give notice of adverse action when the PHA gives Tenant written notice of the proposed decision (see § 966.10(c)(2)). The PHA shall give notice of adverse action no later than the time when the PHA denies a request to change the PHA's proposed decision.

(iv) *Other PHA adverse action.* For a proposed decision by the PHA (as described in § 966.31(a)(2)(iv)) concerning other PHA adverse actions, the PHA shall give notice of adverse action to the Tenant at a time that gives the Tenant the opportunity for a grievance hearing before the adverse action is taken.

(c) *Deadlines*—(1) *Deadline to ask for a change in proposed PHA decision on rent or PHA charges.* (i) The administrative grievance procedure may provide that a Tenant who wants a change in the rent or charges determined by the PHA, as stated in the PHA notice of rent or charges, must ask the PHA to change the determination by a reasonable deadline as determined by the PHA.

(ii) The PHA notice of rent or PHA charges must give notice of the deadline. The time for the Tenant to ask for a change in the rent or charges runs from the PHA notice of the deadline. The notice shall provide in substance:

(A) If the Tenant believes the proposed determination is not correct, the Tenant may ask the PHA to change the determination.

(B) The deadline to ask for a change.

(C) The Tenant may ask for a grievance hearing on the proposed determination. If the Tenant misses the deadline to ask for a change, the Tenant loses the right to a grievance hearing.

(iii) If the Tenant does not submit by the PHA deadline a request to change the rent or PHA charges stated in the PHA notice of rent or charges, the Tenant loses the right to a hearing on the proposed determination, and the PHA is not required to give notice of proposed adverse action concerning the determination.

(iv) A request to change a proposed determination of rent or PHA charges shall be submitted in the form and manner prescribed by the PHA in the PHA's administrative grievance procedure.

(2) *Deadline for requesting hearing.* (i) The PHA administrative grievance procedure may provide that the Tenant must request a hearing by a reasonable deadline as determined by the PHA.

(ii) The PHA may establish different rules for determining the deadline for requesting a hearing in different circumstances, or for different types of grievance. The deadline for the Tenant to request a hearing shall be stated in the notice of proposed adverse action. The PHA administrative grievance procedure may provide that the PHA may grant a Tenant an exception from the deadline if the PHA determines that the exception is justified by individual circumstances.

(d) *Payment of rent as condition for hearing on rent.* (1)(i) The Tenant may request a grievance hearing on a proposed adverse action (as described in § 966.31(a)(2)(iii)) concerning Tenant Rent (the PHA's proposed decision determining the amount of Tenant Rent, or the amount the Tenant owes the PHA for Tenant Rent). Unless the Tenant has paid the PHA the full amount of rent the Tenant owes, as determined by the PHA (except as provided in § 966.31(d)(1)(ii)), and continues to make such payments promptly until completion of the grievance hearing, the PHA is not required to commence or continue a grievance hearing concerning Tenant Rent.

(ii) The Tenant may challenge an increase in the Tenant Rent as determined by the PHA at reexamination. As a condition for obtaining a grievance hearing on the increase, the PHA may require the Tenant to pay the amount of the Tenant Rent in effect before the increase until completion of the grievance hearing.

(iii) The Tenant may challenge the amount of a decrease in the Tenant Rent as determined by the PHA at reexamination, or may challenge a determination at reexamination that the Tenant Rent will not increase or decrease. As a condition for obtaining a grievance hearing on the amount of Tenant Rent, the PHA may require the Tenant to pay the PHA the amount of the Tenant Rent, as determined by the PHA at reexamination, until completion of the grievance hearing.

(2) The PHA may not deny the opportunity for a grievance hearing on a proposed adverse action (as described in § 966.31(a)(2)(iii) (B) or (C)) concerning the PHA's proposed decision determining the amount of PHA charges in addition to rent, or the amount the Tenant owes the PHA for PHA charges in addition to rent, on the ground that the Tenant has not paid the PHA the full amount, as determined by the PHA, of the charges the Tenant owes to the PHA.

(e) *Effect of grievance proceeding on eviction.* (1) If the Tenant makes a timely request for a hearing on a proposed decision to terminate the tenancy or to evict the occupants:

(i) For a proposed termination of the lease by the PHA, or a proposed decision not to renew the lease at the end of the lease term, the lease shall not terminate before completion of the PHA grievance hearing. (For provisions concerning notice of lease termination, see § 966.22.)

(ii) The occupants shall not be evicted from the dwelling unit before completion of the PHA grievance hearing.

(2) Where the PHA elects to exclude grievances concerning a termination of tenancy or eviction from the PHA's administrative grievance procedure in accordance with Subpart E of this Part:

(i) The requirement to give notice of a proposed adverse action under § 966.31(b), and the requirement to provide the opportunity for a grievance hearing on such action, does not apply to a termination of tenancy or eviction. (However, the PHA must give notice of lease termination in accordance with § 966.22.)

(ii) In a court action for eviction of the occupants, the PHA is not bound by a grievance hearing decision which is issued after commencement of the eviction action. The Tenant is not entitled to any delay in or continuance of the eviction action because of any pending grievance hearing proceeding.

(f) *Prohibition of hearing fees.* The PHA may not require a Tenant to pay any hearing fees or hearing costs as a condition for providing the Tenant an opportunity for an administrative grievance hearing under the PHA grievance procedure, and may not impose any hearing fees or hearing costs on the Tenant. (However, the PHA may require the payment of Tenant Rent as a condition for a hearing concerning Tenant Rent in accordance with § 966.31(d).)

(g) *Tenant non-use of grievance process.* The Tenant is not required to use the administrative grievance procedure for review of any PHA adverse action. The Tenant is not barred from using any otherwise available judicial procedure for review of PHA adverse action because of the Tenant's failure to use the PHA administrative grievance procedure for review of such action. Such failure shall not waive or affect the Tenant's right to trial on the issues.

§ 966.32 Hearing procedure.

(a) *Hearing officer.* (1) A hearing under the PHA's administrative grievance procedure shall be conducted by a person or persons (who may be an employee or officer of the PHA) designated by the PHA in the manner required under the PHA's grievance procedure.

(2) The hearing officer shall be someone other than the person who made or approved the decision for the proposed adverse action under review or a subordinate of such person.

(b) *Representation of Tenant.* At its own expense, the Tenant may be represented at the hearing by a person of the Tenant's choice.

(c) *Authority of hearing officer.* The hearing officer may regulate the conduct of the administrative grievance hearing in accordance with the PHA's administrative grievance procedure.

(d) *Examination of relevant materials.* The Tenant shall be permitted to examine and copy any relevant non-privileged documents in the possession or control of the PHA, including records or regulations. This opportunity shall be given at a time that will give the Tenant a reasonable opportunity to make use of the information in the grievance proceeding. If the PHA fails to produce documents timely, in response to the Tenant's request for examination, the hearing officer may prohibit the PHA from using the documents at the hearing.

(e) *Evidence.* (1) The Tenant and the PHA may present evidence, and may question any witnesses. The Tenant and the PHA may have others make statements at the hearing.

(2) Evidence may be considered without regard to admissibility under the rules of evidence which apply in judicial proceedings.

(f) *Expeditious hearing.* The PHA shall proceed with the hearing in a reasonably expeditious manner and in accordance with the PHA's administrative grievance procedure.

§ 966.33 Hearing decision.

(a) The hearing officer shall issue a written decision which states the basic reasons for the decision. Factual determinations concerning the individual circumstances of the Tenant and Household shall be based on evidence presented at the hearing. A copy of the hearing decision shall be furnished promptly to the Tenant.

(b) The PHA is not bound by a hearing decision if:

(1) The decision concerns a matter for which an administrative grievance hearing is not required under this Subpart (see § 966.31(a) for required coverage) or otherwise in excess of the authority of the hearing officer, or

(2) The decision is contrary to HUD regulations or requirements, or otherwise contrary to Federal, State or local law.

(c) If the PHA determines that it is not bound by the decision of the hearing officer, the PHA shall promptly notify the Tenant in writing of the determination, and of the reasons for the determination.

§ 966.34 Special provisions for Turnkey III of Mutual Help Projects.

Pursuant to § 966.1(c), grievance hearing requirements (24 CFR Part 966, Subparts D and E) are applicable to the Turnkey III Program and the Mutual Help Program. However, the following modifications shall be applicable for these programs, and shall be reflected in the administrative grievance procedure established by the PHA in accordance with § 966.30:

(a) Section 966.31(a)(2) (which defines the meaning of proposed adverse action) shall not be applicable for these programs. For provisions stating cases which constitute proposed adverse action in the Turnkey III Program, see § 904.107(p)(2), and in the Mutual Help Program, see § 905.424(g)(2).

(b)(1) In the Turnkey III Program, either of the following notices may be combined with a notice of proposed adverse action (§ 966.31(b)):

(i) The notice under § 904.107(m)(2) (that the PHA is terminating the Homebuyers Ownership Opportunity Agreement).

(ii) The notice under § 904.107(o)(2) (that the homebuyer has lost homeownership potential and should be transferred to a rental unit).

(2) In the Mutual Help Program, the notice under § 905.424(b) (that the IHA is terminating the MHO Agreement) may be combined with a notice of proposed adverse action (§ 966.31(b)).

§ 966.35 Additional grievance procedures.

Infomal PHA administrative grievance hearings to review proposed PHA adverse action are required under this Subpart (§ 966.30 and § 966.31). At its discretion, a PHA may provide additional means for Tenant opportunity to comment upon, or for Tenant opportunity to request PHA consideration of, any matter pertaining to the Tenant's occupancy or the Tenant's rights or obligations. The discretionary PHA procedures may be designed for the purpose of affording an opportunity for informal clarification and resolution of disputes or potential disputes. The PHA may elect to make the administrative grievance procedures adopted by the PHA under § 966.30(c), or the hearing procedures stated in § 966.32, applicable to such additional discretionary procedures adopted by the PHA.

Subpart E—Excluding Grievance on Eviction or Termination of Tenancy From Administrative Grievance Procedure

§ 966.40 Purpose.

The purpose of this Subpart E is to implement the statutory authority for a PHA to exclude grievances concerning termination of tenancy or eviction from the PHA's administrative grievance procedure if HUD determines that applicable law requires that a tenant must be given the opportunity for a hearing in court which provides the basic elements of due process (section 6(k) of the United States Housing Act of 1937, as added by section 204 of the Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98–181). This subpart establishes a procedure for the HUD determination whether State and local law requires a hearing which provides the basic elements of due process.

§ 966.41 Procedure for HUD determination.

(a) *Exclusion from grievance procedure.* (1) A PHA may exclude grievances concerning termination of tenancy or eviction from the PHA administrative grievance procedure under Subpart D if HUD issues a determination ("due process determination") (under § 966.41(c)) that specified procedures for judicial eviction under State and local law require that a tenant must be given the opportunity for a hearing in court which provides the basic elements of due process before eviction from the dwelling unit (see definitions of "due process determination" and "elements of due process" in § 966.2).

(2) If HUD issues a due process determination, the PHA may evict the occupants of a dwelling unit through the specified procedures for judicial eviction which are the subject of the determination. The PHA is not required to give notice of proposed adverse action concerning a termination of tenancy or eviction, and is not required to provide the opportunity for a hearing under the PHA's administrative grievance procedure. Unless the PHA uses the specified eviction procedures which are the subject of a due process determination, the PHA may not evict the occupants without providing to the Tenant the opportunity for an administrative grievance hearing (in accordance with Subaprt D) prior to eviction.

(3) The PHA's decision to exclude grievances concerning termination of tenancy or eviction from the PHA's administrative grievance procedure adopted by the PHA under Subpart D shall be stated in the grievance procedure.

(4) In a court action for eviction of the occupants, the PHA is not bound by a grievance hearing decision issued after commencement of the eviction action. The Tenant shall not be entitled to any delay in or continuance of the court action because of a pending PHA grievance hearing proceeding.

(b) *PHA request for due process determination.* (1) A due process determination is issued by HUD at the request of the PHA. A PHA which wants a due process determination submits the request for a due process determination to the HUD Field Counsel. A request for a due process determination may be submitted at any time.

(2) A PHA shall give Tenants in the PHA's program reasonably effective general notice that the PHA intends to request a due process determination. The notice shall identify the eviction procedures for which a due process determination will be requested, and shall invite Tenant and other public comment on the proposed determination. The notice shall be given through means determined by the PHA (e.g., posting in project offices, notice to Tenant organizations, or notice to individual Tenants in the program).

(3) A PHA request for a due process determination shall:

(i) State the specific eviction procedures under the State and local law for which the PHA is requesting a due process determination.

(ii) Certify that the PHA has given required general notice to Tenants (in accordance with section 966.41(b)(2)). The PHA shall furnish to HUD copies of all written public comments on the PHA request which are received by the PHA within 30 calendar days of notice to the Tenants.

(4) (i) The PHA request for a due process determination shall be submitted in the form required by HUD Field Counsel.

(ii) The PHA shall submit any legal analysis or information requested by the HUD Field Counsel for issuance of a due process determination. To avoid the need for duplicative submissions of relevant materials affecting more than one PHA, PHAs may arrange for consolidated submissions to HUD Field Counsel.

(5) Copies of the PHA request for a due process determination, and of the materials submitted to HUD by the PHA in support of the request, shall be made available by the PHA for public inspection and copying by any person.

(c) *Procedure for due process determination by HUD.* (1) In making a due process determination, HUD may use all available relevant information on legal requirements governing procedures for judicial eviction under State and local law, including (without limitation) the test of State or local laws and ordinances, State or local regulations, court rules and court decisions or opinions of a State attorney general. Anyone may submit at any time information relevant to a due process determination.

(2) HUD will give the PHA a statement of the due process determination. The statement shall include:

(i) The name of the PHA.

(ii) A description of the specific eviction procedures which are covered by the due process determination (such as eviction actions brought in a particular local landlord-tenant court).

(iii) A statement that HUD has determined that the procedures provide the elements of due process prior to eviction.

(iv) A statement summarizing the legal basis for HUD's due process determination. The statement will briefly describe the basis for HUD's conclusion that the eviction procedures meet each of the due process elements.

(3) (i) The due process determination is effective when HUD's statement of the determination is given to the PHA.

(ii) After receiving the determination, the PHA may exclude from the PHA administrative grievance procedure any grievances concerning termination of tenancy or eviction by use of the specific eviction procedures which are the subject of the determination.

(iii) At the request of any Tenant, the PHA shall make available for inspection and copying copies of the due process determination issued by HUD. The HUD Field Office shall also make available for inspection and copying by any person copies of HUD's due process determinations for PHAs in the Field Office jurisdiction.

(4) (i) HUD may revise or withdraw a due process determination at any time. Such action may be based on any available information, including any changes in applicable State or local law, or any court decisions since the original due process determination.

(ii) If HUD decides to revise or withdraw a due process determination, HUD will give the PHA a statement of the decision. The change is effective immediately when the statement is given to the PHA.

PART 960—[AMENDED]

2. The heading for Part 960 is revised to read as follows:

PART 960—ADMISSION TO AND OCCUPANCY OF PUBLIC HOUSING

3. The authority citation for 24 CFR Part 960 is revised to read as follows:

Authority: U.S. Housing Act of 1937 (42 U.S.C. 1437–1437r); section 7(d), Department of Housing and Urban Development Act, (42 U.S.C. 3535(d)).

4. In § 960.207, the section heading and paragraph (a) are revised to read as follows:

§ 960.207 Notice and hearing for applicants.

(a) *Ineligible applicant.* (1) The PHA shall give an applicant for admission prompt written notice of a decision that the applicant is not eligible for admission for any reasons. The notice shall inform the applicant of the basic reasons for the decision. The notice shall also state that the applicant may request an informal hearing on the decision, and shall describe how to obtain the informal hearing.

(2) The PHA shall give the applicant an opportunity for an informal hearing on the decision, in accordance with procedures adopted by the PHA. The hearing shall be held within a reasonable time of the decision. The informal hearing shall be conducted by a person or persons (who may be an officer or employee of the PHA) designated by the PHA in accordance with the applicant hearing procedures adopted by the PHA. The hearing officer shall be someone other than the person who made the decision under review or a subordinate of such person. The applicant shall be given an opportunity to present written or oral objections to the PHA decision. The PHA shall promptly notify the applicant in writing of the final PHA decision after the informal hearing. The notice shall state the basic reasons for the decision.

(3) The informal review provisions for the denial of a Federal preference under § 960.211 are contained in paragraph (k) of that section.

* * * * *

PART 913—DEFINITION OF INCOME, INCOME LIMITS, RENT AND REEXAMINATION OF FAMILY INCOME FOR THE PUBLIC HOUSING AND INDIAN HOUSING PROGRAMS

5. The authority citation for Part 913 continues to read as follows:

Authority: Secs. 3, 6, and 16, U.S. Housing Act of 1937 (42 U.S.C. 1437a, 1437d, and 1437n); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

6. The definition of "Total Tenant Payment" in § 913.102 is revised to read as follows:

§ 913.102 Definitions.

* * * * *

Total Tenant Payment. The monthly amount calculated under § 913.107. Total Tenant Payment does not include any PHA charges to Tenant in addition to Tenant Rent, including surcharges for excess consumption of PHA-furnished utilities or other PHA charges.

* * * * *

PART 904—LOW RENT HOUSING HOMEOWNERSHIP OPPORTUNITIES

7. The authority citation for 24 CFR Part 904 is revised to read as set forth below:

Authority: U.S. Housing Act of 1937 (42 U.S.C. 1437–1437r); section 204 of the Housing and Urban-Rural Recovery Act of 1984, Pub. L. 98–181, November 30, 1983; section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

8. In § 904.107, the section heading is revised, paragraph (l)(3) is revised, paragraph (m)(1) is revised, and paragraph (p) is added, to read as follows:

§ 904.107 Responsibilities of homebuyer; administrative grievance hearing.

* * * * *

(l) * * *

(3) If there is no qualified successor in accordance with paragraph (l)(2) of this section, the LHA shall terminate the Agreement and another family shall be selected except in the following circumstances: Where a minor child or children of the homebuyer family are in occupancy, then in order to protect their continued occupancy and opportunity

for acquisition of ownership of the home, the LHA may approve as occupants of the unit, an appropriate adult(s) who has been appointed legal guardian of the children with a duty to perform the obligations of the Homebuyers Ownership Opportunity Agreement in their interest and behalf. To terminate the Agreement in accordance with this paragraph (l)(3), the LHA shall give adequate written notice of termination, which shall not be less than 30 days.

(m) *Termination by LHA.* (1) The LHA may terminate the Homebuyers Ownership Opportunity Agreement, 30 days after giving the homebuyer notice in accordance with paragraph (m)(2) of this section, if there is any serious or repeated violation by the homebuyer of the homebuyer's obligations under the Agreement. The LHA may determine that failure to make the required monthly payment within ten days after its due date, or misrepresentation or withholding of information in applying for admission or in connection with any subsequent reexamination of family income and composition, constitutes a serious breach of the homebuyer's obligations under the Agreement.

* * * * *

(p) *Administrative grievance procedure.* (1) Pursuant to § 966.1(c) and § 966.34, administrative grievance requirements (24 CFR Part 966, Subparts D and E, as modified in accordance with § 966.34) are applicable to the Turnkey III Program.

(2) The following shall be considered proposed adverse actions by the LHA under 24 CFR Part 966:

(i) A proposed LHA decision determining the amount of the required monthly payment or of the utility reimbursement by the LHA to the homebuyer, the amount of charges by the LHA against the homebuyer's EHPA or NRMR, or the amount the homebuyer owes the PHA for the required monthly payment, or determining the LHA's proposed settlement at termination of the homeownership agreement or at purchase of the home by the homebuyer.

(ii) A proposed decision that the homebuyer has lost homeownership potential and should be transferred to a rental unit (see § 904.107(o)(2)).

(iii) A proposed decision to terminate the Homebuyers Ownership Opportunity Agreement, or to evict the family from the home.

(iv) A proposed decision to take other specific, concrete and affirmative individualized action contrary to the interests of a homebuyer.

PART 905—INDIAN HOUSING

9. The authority citation for 24 CFR Part 905 is revised to read as set forth below and any authority citation following any section in Part 905 is removed:

Authority: U.S. Housing Act of 1937 (42 U.S.C. 1437–1437r); section 204 of the Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98–181, November 30, 1983; section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

10. Section 905.303 is revised to read as follows:

§ 905.303 Tenant leases for rental projects.

A written lease shall be entered into between the IHA and the tenant of a dwelling unit in an IHA Rental Project. The lease:

(a) Shall obligate the IHA to maintain the project in a decent, safe and sanitary condition,

(b) Shall require the IHA to give adequate written notice of termination of the lease in accordance with § 966.22,

(c) Shall require that the IHA may not terminate the tenancy except for the grounds stated in § 966.21, and

(d) Shall not include any of the types of lease provisions prohibited in § 966.11.

11. In § 905.424, the section heading is revised, paragraph (a) is revised, paragraph (f)(3) is revised, and a new paragraph (g) is added, to read as follows:

§ 905.424 Termination of MHO Agreement; administrative grievance procedure.

(a) *Termination upon breach.* The IHA may terminate the MHO Agreement if there is any serious or repeated violation by the Homebuyer of the Homebuyer's obligations under the MHO Agreement. The IHA may determine that misrepresentation or withholding of material information in applying for admission or in connection with any subsequent reexamination of income and family composition constitutes a serious breach of the Homebuyer's obligations under the MHO Agreement. "Termination" as used in the MHO Agreement does not include acquisition of ownership by the Homebuyer.

* * * * *

(f) * * *

(3) Compliance with the plan shall be checked by the IHA not later than 30 days from the date thereof. If the Homebuyer refuses to agree to such a plan, or fails to comply with the plan, the IHA shall issue a notice of termination of the MHO Agreement in accordance with paragraph (b) of this section, and shall proceed to evict the Homebuyer. The IHA may only evict the Homebuyer from the Home: (i) Through a civil court proceeding in which the Homebuyer has the opportunity to present a defense, and (ii) after a decision by the court on the rights of the parties.

* * * * *

(g) *Administrative grievance procedure.* (1) Pursuant to § 966.1(c) and § 966.34, administrative grievance requirements (24 CFR Part 966, Subparts D and E, as modified in accordance with § 966.34) are applicable to the Mutual Help Program.

(2) The following shall be considered proposed adverse actions by the IHA under 24 CFR Part 966:

(i) A proposed decision determining the amount of the Homebuyer's MH Contribution credits.

(ii) A proposed decision determining the amount of the Required Monthly Payment, the amount the Homeowner owes the IHA for the Required Monthly Payment, or the amount of charges by the IHA against the Homebuyer's reserves and accounts under § 905.421, or determining the IHA's proposed settlement at termination of the MHO Agreement or at purchase of the Home by the Homebuyer.

(iii) A proposed decision to terminate the Mutual Help and Occupancy Agreement, or to evict the family from the Home.

(iv) A proposed decision to take other specific, concrete and affirmative individualized action contrary to the interests of the Homebuyer.

(3) The IHA's determination (under § 905.419) of the Administration Charge for the IHA's Mutual Help Program does not constitute adverse action by the IHA, and the IHA is not required to provide the opportunity for a hearing to consider such determination (see also § 966.31(a)(3)).

12. In § 905.425, paragraph (g) is revised to read as follows:

§ 905.425 Succession upon death, mental incapacity or abandonment.

* * * * *

(g) *Termination in absence of qualified successor or occupant.* If there is no qualified successor in accordance with any of the foregoing paragraphs of this section, the IHA shall terminate the MHO Agreement. To terminate the Agreement in accordance with this paragraph (g), the IHA shall give adequate written notice of termination, which shall not be less than 30 days.

Date: August 17, 1988.

J. Michael Dorsey,

Acting Secretary of Housing and Urban Development.

[FR Doc. 88–19287 Filed 8–29–88; 8:45 am]

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Tuesday
August 30, 1988

Part III

Environmental Protection Agency

40 CFR Parts 257 and 258
Solid Waste Disposal Facility Criteria; Proposed Rule

S-021999 0001(00)(29-AUG-88-16:44:29)
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 257 and 258

[FRL-3227-7]

Solid Waste Disposal Facility Criteria

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency today is proposing revisions to the Criteria for Classification of Solid Waste Disposal Facilities and Practices set forth in 40 CFR Part 257. These revisions were developed in response to the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act (RCRA). This proposed action would amend Part 257 by including information requirements for certain solid waste disposal facilities and by excluding municipal solid waste landfills (MSWLFs) from Part 257. In addition, this action would add a new Part 258, which spells out specific requirements for MSWLFs.

Amended Part 257 would establish notification and exposure information requirements for owners and operators of industrial solid waste disposal facilities and construction/demolition waste landfills. The new Part 258 sets forth revised minimum Criteria for MSWLFs, primarily in the form of performance standards, including location restrictions, facility design and operating criteria, ground-water monitoring requirements, corrective action requirements, financial assurance, and closure and post-closure care requirements.

EPA believes that the provisions in today's proposal are necessary for the protection of human health and the environment and take into account the practicable capability of owners and operators of municipal solid waste landfills. The Agency is requesting comment on the overall approach proposed and on specific components of the proposal.

Today's proposal also is intended to fulfill a portion of EPA's mandate under section 405(d) of the Clean Water Act (CWA) to promulgate regulations governing the use and disposal of sewage sludge. Under today's proposal, Part 258 would be co-promulgated under the authority of the CWA; this authority would apply to all municipal solid waste facilities in which sewage sludge is co-disposed with household wastes. A separate regulation for sludge monofills (landfills in which only sewage sludge is disposed of) is being prepared for future proposal under 40 CFR Part 503.

DATES: Comments on this proposed rule must be submitted on or before October 31, 1988.

Public hearings are scheduled as follows:

(1) October 13, 1988, 9:00 a.m. to 4:30 p.m., at the Sheraton National Hotel, 900 Orme Street, Arlington, VA. 22204, (703) 521-1900.

(2) October 18, 1988, 9:00 a.m. to 4:30 p.m., at the Sheraton Century Center Hotel, 2000 Century Boulevard, NE, Atlanta, Georgia. 30345-3377, (404) 325-0000.

(3) October 20, 1988, 9:00 a.m. to 4:30 p.m., at the Sheraton Anaheim, 1015 West Ball Rd., Anaheim, CA. 92802, (714) 778-1700

(4) October 25, 1988, 9:00 a.m. to 4:30 p.m., at the O'Hare Hilton Hotel, P.O. Box 66414, O'Hare International Airport, Chicago, Illinois. 60666 (312) 686-8000.

The meetings may be adjourned earlier if there are no remaining comments. Requests to present oral testimony should be received by EPA at least 10 days before each public meeting.

A block of rooms has been reserved at the above mentioned hotels for the convenience of individuals requiring lodging. Please make room reservations directly with the hotel and refer to the EPA hearings. The hearing registration will be at 8:00 a.m., with the hearings beginning at 9:00 a.m. and running until 4:30 p.m., unless concluded earlier. Anyone wishing to make a statement at the hearing must notify, in writing, Public Participation Officer, Office of Solid Waste (WH-562A), U.S. Environmental Protection Agency, 401 M Street, SW; Washington, DC 20460. Those wishing to make oral presentations must restrict them to 15 minutes and are encouraged to have written copies of their complete comments for inclusion in the official record.

The Agency is tentatively planning to coordinate these Subtitle D Criteria public meetings with the public meetings on EPA's Draft National Strategy for Municipal Waste which is expected to be issued in the near future. EPA will announce these meetings in a separate FR notice. For information on the strategy please see 53 FR 13316 (April 22, 1988).

ADDRESSES: Commentors must send an original and two copies of their comments to: RCRA Docket Information Center, (OS-305), U.S. Environmental Protection Agency Headquarters, 401 M Street, SW; Washington, DC 20460. Comments should include the docket number F-88-CMLP-FFFFF. The public docket is located at EPA Headquarters (sub-basement) and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Appointments may be made by calling (202) 475-9327. Copies cost $.15/page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA/CERCLA Hotline, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, SW; Washington, DC 20460, (800) 424-9346, toll-free, or (202) 382-3000, local in the Washington, DC metropolitan area.

For information on specific aspects of this proposed rule, contact either Allen Geswein or Paul Cassidy, Office of Solid Waste (OS-323), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382-4659 or 382-3346.

SUPPLEMENTARY INFORMATION:

Copies of the following Subtitle D Criteria background documents are available for purchase through the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161, (703) 487-4650. EPA and NTIS numbers and NTIS prices are listed below. Documents cannot be obtained directly from EPA.

(1) U.S. EPA, Office of Solid Waste (OSW). Notification Requirements for Industrial Solid Waste Disposal Facilities—Criteria for Classification of Solid Waste Disposal Facilities and Practices (40 CFR Part 257)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). August 1988 (draft). EPA/530-SW-88-044, PB88-242 508, $12.95.

(2) U.S. EPA, OSW. Location Restrictions (Subpart B)—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft). EPA/530-SW-88-036, PB88-242 425, $19.95.

(3) U.S. EPA, OSW. Operating Criteria (Subpart C)—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft). EPA/530-SW-88-037, PB88-242 433, $19.95.

(4) U.S. EPA, OSW. Closure/Post-Closure Care and Financial Responsibility Requirements (Subpart C, §§ 258.30-258.32)—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft). EPA/530-SW-88-041, PB88-242 474, $19.95.

(5) U.S. EPA, OSW. Design Criteria (Subpart D)—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft). EPA/530-SW-88-042, PB88-242 482, $19.95.

(6) U.S. EPA, OSW. Ground-Water Monitoring and Corrective Action (Subpart E)—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft). EPA/530-SW-88-043, PB88-242 490, $19.95.

(7) U.S. EPA, OSW. Case Studies on Ground-Water and Surface Water Contamination from Municipal Solid Waste Landfills—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft). EPA/530-SW-88-040, PB88-242 466, $14.95.

(8) U.S. EPA, OSW. Summary of Data on Municipal Solid Waste Landfill Leachate Characteristics—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft). EPA/530-SW-88-038, PB88-242 441, $19.95.

(9) U.S. EPA, OSW. Updated Review of Selected Provisions of State Solid Waste Regulations—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft). EPA/530-SW-88-039, PB88-242 458, $14.95.

(10) U.S. EPA, OSW. Regulatory Impact Analysis (RIA) of Proposed Revisions to Subtitle D Criteria for Municipal Solid Waste Landfills—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft). EPA/530-SW-88-045, PB88-242 516, $25.95.

All documents can be microfiched for $6.95.

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B. Part 258

I. Authority

These regulations are being proposed under the authority of sections 1008, 4004, and 4010 of the Resource Conservation and Recovery Act of 1976. Section 1008 directed EPA to publish guidelines for solid waste management, including criteria that define solid waste management practices that constitute open dumping and are prohibited under Subtitle D of RCRA. Section 4004 further required EPA to promulgate regulations containing criteria for determining which facilities are sanitary landfills and which are open dumps. In response, EPA promulgated the "Criteria for Classification of Solid Waste Disposal Facilities and Practices" (40 CFR Part 257) in 1979. Section 4010, added by the Hazardous and Solid Waste Amendments of 1984 (HSWA), directs EPA to revise those Criteria promulgated under sections 1008 and 4004 for facilities that may receive household hazardous waste (HHW) or small quantity generator (SQG) hazardous waste.

For municipal solid waste landfills in which sewage sludge is disposed of together with household wastes, the Part 258 regulations also are being proposed under the authority of section 405 (d) and (e) of the CWA. Section 405 regulates the use and disposal of sewage sludge generated by treatment works treating domestic sewage. Section 405 requires that EPA develop standards for sludge use and disposal, including: An identification of the major use and disposal practices, factors to be taken into account in determining applicable measures and practices for each use or disposal, and concentrations of pollutants that interfere with each use or disposal. When the CWA was amended in February 1987, additional requirements were added to section 405. Congress directed EPA to identify toxic pollutants that may be present in sewage sludge in concentrations that may adversely affect public health and the environment and to establish numerical limitations and management practices for each identified pollutant for each use of disposal option. The numerical limitations and management practices are to be adequate to protect public health and the environment from any reasonably anticipated adverse effects of each pollutant. Further, the amendments require that these section 405(d) sludge standards be implemented through National Pollutant Discharges Elimination System (NPDES) permits issued to publicly owned treatment works (POTWs) or other treatment works treating domestic sewage unless the standards have been included in a permit issued under RCRA Subtitle C; the Safe Drinking Water Act; the Marine Protection, Research and Sanctuaries Act; the Clean Air Act; or a State permit where the State program has been approved as ensuring compliance with section 405. In addition section 405(e) prohibits any person from disposing of sludge from a POTW or other treatment works treating domestic sewage except in accordance with the section 405(d) regulations.

II. Background

Subtitle D of RCRA establishes framework for Federal, State, and local government cooperation in controlling the management of nonhazardous solid waste. The Federal role in this arrangement is to establish the overall regulatory direction, to provide minimum standards for protecting human health and the environment, and to provide technical assistance to States for planning and developing environmentally sound waste management practices. The actual planning and direct implementation of solid waste programs under Subtitle D, however, remain State and local functions.

Section 405(d)–(f) of the CWA establishes a comprehensive framework for regulating the use and disposal of sewage sludge. Section 405(d) provides for the Federal promulgation of numerical limitations and management practices governing the use and disposal of sludge. Section 405(e) provides for Federal enforcement of those standards. Section 405(f) requires the implementation of these regulations through permits issued to POTWs under section 402 of the CWA, unless they have been included in a permit issued under Subtitle C of RCRA or other authority listed in that section. The permits are to be issued by EPA or by a State with a program that has been approved as ensuring compliance with section 405 of the CWA.

A. Current Subtitle D Criteria

Under the authority of sections 1008(a)(3) and 4004(a) of RCRA, EPA promulgated the "Criteria for Classification of Solid Waste Disposal Facilities and Practices" (40 CFR Part 257) on September 13, 1979. EPA issued minor modifications to these Criteria on September 23, 1981. These Subtitle D Criteria establish minimum national performance standards necessary to ensure that "no reasonable probability of adverse effects on health or the environment" will result from solid waste disposal facilities or practices. A facility or practice that meets the Criteria is classified as a "sanitary landfill"; a facility failing to satisfy any of the Criteria is considered an "open dump" for purposes of State solid waste management planning. State plans developed under the "Guidelines for Development and Implementation of State Solid Waste Management Plans" (40 CFR Part 256) must provide for closing or upgrading all existing "open dumps" within the State.

The existing Part 257 Criteria include general environmental performance standards addressing eight major topics: Floodplains (§ 257.3–1), endangered species (§ 257.3–2), surface water (§ 257.3–3), ground water (§ 257.3–4), land application (§ 257.3–5), disease (§ 257.3–6), air (§ 257.3–7), and safety (257.3–8). The following briefly summarizes these provisions.

Section 257.3–1 specifies that facilities or practices in floodplains shall not interfere with the floodplain or result in washout of solid waste so as to pose a hazard to human life, wildlife, or land or water resources. Section 257.3–2 prohibits solid waste disposal facilities and practices that cause or contribute to the taking of any endangered or threatened species or result in the destruction or adverse modification of the critical habitats of such species. The surface water provision, § 257.3–3, specifies that disposal facilities shall not cause a discharge of pollutants or dredged or fill material to waters of the United States that is in violation of section 402 or 404 of the CWA. Section 257.3–4 lays out the ground-water protection standards, which require that facilities and practices not exceed the Safe Drinking Water Act maximum contaminant levels (MCLs) in an underground drinking water source beyond the solid waste unit boundary or beyond an alternative boundary specified by the State.

Section 257.3–5 requires that a facility or practice meet certain restrictions with respect to the concentrations of cadmium and polychlorinated biphenyls (PCBs) contained in waste applied to land used for producing food chain crops. Section 257.3–6 specifies that waste disposal facilities and practices must institute appropriate disease vector controls, such as periodic application of cover material. In addition, § 257.3–6 requires pathogen reduction processes for sewage sludges and septic tank pumpings applied to land.

The air criterion in § 257.3–7 prohibits open burning of solid waste (with certain exceptions) and specifies that the applicable requirements of the State Implementation Plans developed under section 110 of the Clean Air Act must be met. Finally, the safety provisions of § 257.3–8 require control of explosive gases, fires, bird hazards to aircraft, and public access to the facility.

Currently, EPA does not have the authority to enforce these existing Part 257 Criteria directly, except in situations involving the disposal or handling of POTW sludge. Federal enforcement of POTW sludge handling facilities is authorized under the CWA. The existing Criteria, as they apply to non-sludge-handling facilities, are enforced by the States through State regulatory programs or by citizens through the citizen suit provisions of section 7002 of RCRA.

B. Hazardous and Solid Waste Amendments of 1984

In 1984, Congress made significant modifications to Subtitle D of RCRA through the Hazardous and Solid Waste Amendments. As described below, the major modifications to Subtitle D include requirements that EPA complete a Subtitle D study and revise the Part 257 Criteria, and that States implement revised permitting programs.

1. Subtitle D Study and Report to Congress

HSWA added a new section 4010 to RCRA, which requires EPA to "conduct a study of the extent to which the guidelines and Criteria under this Act (other than guidelines and Criteria for facilities to which Subtitle C applies) which are applicable to solid waste management and disposal facilities * * * are adequate to protect human health and the environment from ground water contamination." This study is to include a detailed assessment of the adequacy of the Criteria regarding monitoring, prevention of contamination, and remedial action for protecting ground water and also is to identify "recommendation with respect to any additional enforcement authorities which the Administrator, in consultation with the Attorney General, deems necessary." EPA anticipates submitting a Report to Congress on the results of the study shortly.

2. Criteria Revisions

Section 4010 also required EPA to revise the Subtitle D Criteria by March 31, 1988, for facilities that may receive household hazardous waste or hazardous waste from small quantity generators. These revisions must be those necessary to protect human health and the environment, but, at a minimum, should require ground-water monitoring as necessary to detect contamination, establish location standards for new or existing facilities, and provide for corrective action, as appropriate. Section 4010 further states that EPA may take into account the "practicable capability" of facilities to implement the Criteria. Today's proposal represents the first phase of the Agency's promulgation of these mandated revisions.

3. Implementation and Enforcement

HSWA amended section 4005 of RCRA to require States to establish by November 8, 1987, a permit program or other system of prior approval to ensure that facilities that receive HHW or SQG hazardous waste are in compliance with the existing Part 257 Criteria. Within 18 months of promulgation of revised Criteria, each State must modify its permit program to ensure compliance with the revised Criteria. If the Administrator determines that a State has not adopted an adequate permit program, EPA may enforce the revised Criteria at facilities that may receive HHW or SQG waste.

C. Current Sewage Sludge Criteria

The existing Part 257 Criteria discussed above were co-promulgated under the joint authority of RCRA and section 405(d) of the CWA. The Part 257 regulations thus apply to all sludge land disposal practices, except distributing and marketing sludge. Because these regulations apply to sewage sludge, they are directly enforceable by EPA against any person found to be in violation of them.

In February 1987, Congress enacted the Water Quality Act of 1987, which amended portions of the CWA, including section 405. First, Congress expanded section 405(d) to impose new standard-setting requirements with associated deadlines. Second, Congress established new sludge permitting requirements in section 405(f) along with State program requirements. EPA currently is developing sludge regulations to be proposed under section 405(d) and published in 40 CFR Part 503. In addition, EPA already has published a proposed regulation in 40 CFR Part 501 that would implement the requirements of section 405(f) (53 FR 7642, March 9, 1988). The comment period for these latter regulations closed on May 9, 1988.

The Part 503 regulations, when promulgated, will address the incineration, ocean disposal, land application, and distribution and marketing of sludge. Lastly, and most relevant here, they also will regulate sludge monofills, which are landfills in which only sewage sludge is disposed of (i.e., no other type of solid waste is co-disposed of with the sewage sludge). Those regulations will not, however, contain regulations for the co-disposal of sewage sludge with household wastes. Regulations for the co-disposal of sewage sludge and household wastes, rather, are part of today's proposal. By this action, the Agency seeks to achieve consistency in its regulation under two legal authorities of a single disposal practice—the co-disposal of sewage sludge and other solid wastes in municipal solid waste landfills.

III. Nature and Scope of the Problem

To fulfill its responsibilities under HSWA, EPA has conducted a series of studies and analyses of solid waste characteristics, waste disposal practices, and environmental and public health impacts resulting from solid waste disposal. Preliminary results of these studies were summarized in the "Subtitle D Study Phase I Report," issued in October 1986 (Ref. 34). Final results, which form the basis for Agency decision making for this rule, are incorporated in EPA's Subtitle D report to Congress, which is expected to be issued shortly. The key studies pertinent to today's proposal are summarized below. Copies of the reports mentioned below are available for public review in the docket for this rulemaking.

A. EPA Studies of Solid Waste Management

1. Analysis of Solid Waste Characteristics

To analyze the characteristics of solid waste, EPA conducted numerous studies to determine the volume, characteristics, and management methods of wastes regulated under Subtitle D. These studies revealed that more than 11 billion tons of solid waste are generated each year, including 7.6 billion tons of industrial nonhazardous waste (which includes about 55.8 million tons of electric utility wastes), 2 to 3 billion tons of oil and gas waste (including both drilling wastes and produced wastes), more than 1.4 billion tons of mining waste, and nearly 160 million tons of municipal solid waste.

Several Subtitle D wastes currently are being addressed under separate Agency efforts and thus were not examined in detail in EPA's Subtitle D study. In particular oil and gas wastes, utility wastes, and mining waste have been the subject of special studies conducted under section 8002 of RCRA and are being considered separately for rulemaking. In addition, the Agency currently is closely evaluating, in a separate effort, the characteristics and management practices for municipal waste combustion ash. Thus, the following discussion focuses on the characteristics of municipal solid waste, household hazardous waste, and small quantity generator hazardous waste, which are the primary waste streams addressed by today's proposal, as well as industrial solid waste.

In 1986, EPA sponsored a study entitled "Characterization of Municipal Solid Waste in the United States, 1960 to 2000" (Ref. 16). This study examined the quantity and composition of municipal solid wastes and forecast the characteristics of municipal solid wastes in the U.S. through the end of the century. The study found that, on average, more than 50 percent of municipal solid waste comprises paper, paperboard, and yard wastes; nearly 40 percent is metals, food wastes, and plastics; and the remaining 10 percent is wood, rubber, leather, textiles, and miscellaneous inorganics. Waste composition was found to be highly site-dependent and influenced significantly by climate, season, and socioeconomic factors. The study determined that approximately 150 million tons of municipal solid waste were generated in 1984 (of which more than 126 million tons were landfilled) and that the waste volume was expected to increase significantly by the end of the century. EPA recently completed an update to this study entitled, "Characterization of Municipal Solid Waste in the United States, 1960–2000 (Update 1988)" (Ref. 17). This update estimated that 158 million tons of municipal solid waste were generated in 1986.

In October 1986, EPA published "A Survey of Household Hazardous Wastes and Related Collection Programs," which analyzed the existing information on characteristics of HHW and reviewed HHW collection programs (Ref. 30). This study indicated that common discarded household products, such as household cleaners, automotive products, paint thinners, and pesticides, may contain hazardous wastes that are either listed under Subtitle C or exhibit one or more hazardous characteristics. Household wastes, including HHW, currently are exempt from regulation under Subtitle C of RCRA.

A third study, "Summary of Data on Industrial Nonhazardous Waste Disposal Practices," compiled available data on industrial solid waste characteristics and land disposal practices in 22 major manufacturing industries (Ref. 29). This study estimated that roughly 390 million metric tons of industrial nonhazardous waste are generated by these industries each year, that 35 percent of these wastes are managed on site, and that 75 percent of these wastes are generated by four industries: Iron and steel, electric power generation, industrial inorganic chemicals, and plastics and resins. Additional information on industrial nonhazardous waste quantities was provided by the Industrial Facility Screening Survey (Ref. 35), which estimated that approximately 7.6 billion tons of industrial nonhazardous wastes are generated each year. The survey is described in more detail below.

In 1985, EPA also conducted the "National Small Quantity Generator Survey," which characterized SQG waste volumes and disposal practices (Ref. 14). (For purposes of this study, SQGs were defined as those operations yielding less than 1,000 kilograms of hazardous waste per month.) This survey indicated that SQGs annually produce 940,000 metric tons of hazardous waste, consisting largely of lead-acid batteries, solvents, and strongly acidic or alkaline wastes. Furthermore, the survey found that solid waste disposal facilities, including MSWLFs, are the second most frequent destination for SQG hazardous waste shipped off site. EPA estimates that MSWLFs may receive from 5 percent to 16 percent of the SQG hazardous waste produced.

Existing information on MSWLF leachate, summarized in the background document on MSWLF leachate quality (Ref. 8), indicates that leachate from MSWLFs generally contain a wide range of inorganic and organic hazardous constituents in varying concentrations. Landfill gas comprises 50 to 60 percent methane, 40 to 50 percent carbon dioxide, and less than 1 percent hydrogen, oxygen, nitrogen, and other trace gases.

2. Review of Waste Disposal Practices

EPA conducted numerous studies to gather existing information on the numbers of Subtitle D facilities, facility design and operating characteristics, leachate and gas characteristics, and environmental and human health impacts associated with different types of facilities. EPA relied on several key sources of information on the number and design and operating characteristics of Subtitle D facilities for this proposal. The first major source was an EPA mail survey of State solid waste management programs conducted in 1985 to gather information on State Subtitle D programs and facilities. The final report on the survey, "Census of State and Territorial Subtitle D Nonhazardous Waste Programs" (State Census), was issued in 1986 (Ref. 46).

The State Census indicated that there are about 227,000 Subtitle D disposal facilities, excluding waste piles (which were not included in the survey). This total includes approximately 16,500 landfills, 191,500 surface impoundments, and 19,000 land application units. In addition, the State Census indicated that there are more than 145,000 oil and gas waste or mining waste facilities, which EPA is addressing in separate efforts.

The States estimated that roughly 37,000 Subtitle D facilities (or 16 percent of all the facilities) may receive hazardous wastes from households or from small quantity generators. The States' estimate of 16,500 landfills included approximately 9,300 MSWLFs; however, the States subsequently identified errors in the numbers reported for MSWLFs and submitted revised figures. These revised State figures and the results from EPA's 1986 municipal solid waste landfill survey, which was a random sample of approximately 1,250 MSWLFs nationwide, indicate that there are a total of 6,034 MSWLFs (as of 1986). The MSWLF survey also provided detailed information on MSWLF design and operation.

In developing this rule, EPA also utilized the results of an industrial facility screening survey, which involved a telephone screening of nearly 30,000 establishments in 22 industries. The primary purpose of this screening survey was to provide EPA with basic information on the universe and characteristics of industrial solid waste disposal facilities.

In general, information on Subtitle D disposal facilities is limited, except for MSWLFs. While new MSWLFs are expected to be better located, designed, and operated, the following observations can be made regarding the universe of existing MSWLFs. According to the State Census, MSWLFs are distributed throughout the country, occurring in virtually every hydrogeologic setting, and generally concentrated near more populated areas; they are owned predominantly by local governments (80 percent), with the remainder owned by private entities (15 percent), the Federal Government (4 percent), and State governments (1 percent). Approximately 42 percent are small (less than 10 acres) and 52 percent dispose of small amounts of waste (less than 17.5 tons per day); only 15 percent are designed with liners (natural or synthetic) and only 5 percent have leachate collection systems. Current data also indicate that only 25 to 30 percent of MSWLFs have some type of ground-water monitoring system. Results from the 1986 MSWLF survey generally are consistent with these results.

3. Assessment of Impacts

Impacts associated with MSWLFs and industrial Subtitle D facilities are described below. Existing data indicate that some MSWLFs are adversely affecting the environment and could harm human health. Industrial solid waste facilities need to be examined more closely to determine their impacts.

a. Municipal Solid Waste Landfills. State inspection data, case study evidence, risk characterization studies, waste and leachate characteristics, and the current limited use of design controls indicate that some MSWLFs have degraded the environment and that this degradation could continue. Older landfills are of most concern because they may have received large volumes of hazardous waste and, in general, their use of design controls was very limited; however, existing data are not sufficient to conclusively demonstrate that MSWLFs currently are harming human health, other than data indicating acute impacts associated with methane releases. Current human health impacts from past exposure to contaminant releases from MSWLFs are difficult to isolate due to the complex interaction of factors that affect human health. However, the Agency's recently completed risk assessments indicate that MSWLFs present future potential risks to human health.

More than 500 MSWLFs, or about 25 percent of MSWLFs with ground-water monitoring systems, were reported by States to be violating a State ground-water protection standard, although the nature and extent of these violations are unknown. In some States, any detectable degradation of the ground water is considered a violation. Most facilities do not monitor for organic hazardous constituents in ground water, so these violations represent analyses for a limited set of pollutants. States also reported that 845 MSWLFs were cited for air-related violations (many of which are likely to be odor-related incidents), and 660 MSWLFs were cited for surface water contamination. Some of these violations may have been reported at sites established before existing State and Federal regulations were in place.

EPA has summarized case study information documenting ground-water and surface water contamination incidents (Ref. 7). Evaluation of 163 MSWLF case studies revealed ground-water contamination at 146 facilities and surface water contamination at 73 facilities. For most of these landfills, information on the waste received either was not available or was incomplete, although a limited number are known to have received hazardous waste before the Subtitle C regulations were issued. At about 50% of the facilities with ground-water contamination, specific contaminants were identified. The most common constituents were iron, chloride, manganese, trichloroethylene, benzene, and toluene. At several sites, drinking water sources were contaminated. Ground-water contaminant plumes characterized at three of the sites extended to (or nearly to) the base of an aquifer at depths of approximately 70 feet (at two sites) and 300 feet (at one site).

The plume from one site migrated one-half mile downgradient of the landfill, while the plume at another site migrated almost one and one-half miles downgradient.

Typically, those facilities causing ground-water contamination were more than 10 years older than facilities reporting no impacts. Ground-water impacts appeared to be more severe in locations characterized by high net infiltration rates and high ground-water flow rates. Most facilities that had contaminated ground water were located close to the ground-water table, underlain by highly permeable soils, or had no or very limited engineering controls. The case study information identifies several factors that may be related to failure at a particular facility, specifically the landfill's age, location, and engineering design; however, it is unknown whether this sample is representative of the universe of MSWLFs, and it is not possible to isolate the specific factors responsible for each failure.

Analysis of damage cases involving methane indicates that methane must be controlled to protect human health. Methane is produced in MSWLFs through anaerobic decomposition of organic waste and is explosive at sufficiently high concentrations (the lower explosive limit). Existing Federal regulations require that the concentration of explosive gases should not exceed 25 percent of the lower explosive limit in facility structures and should not exceed the lower explosive limit at the facility boundary. Methane is produced in such abundance that methane collection projects are in place at approximately 100 landfills for the primary purpose of resource recovery and energy production. Where methane is not controlled, fires and explosions have occurred. In 23 of 29 damage cases studied, methane has been measured in concentrations above the lower explosive limit at distances up to 1,000 feet off site. Explosions and fires, both on site and off site, have occurred in 20 of the 29 cases, loss of life has been documented in five instances, and injuries have been reported in several others. Most of these sites where injuries or death occurred did not have a landfill gas control system.

EPA also examined the characteristics of landfills on the Superfund National Priorities List (NPL) in May 1986 (Ref. 26). Of the 850 sites listed or proposed for listing on the NPL (in May 1986), 184 sites (22 percent) were identified as MSWLFs. In addition, of the 27,000 sites in the Superfund data base, almost one fourth are MSWLFs. In general, the MSWLFs on the NPL were poorly located and designed. Because most of the NPL sites were in operation before 1980 (the effective date of EPA's hazardous waste rules) and may have received hazardous wastes in addition to Subtitle D wastes, they are not representative of newer, better designed and operated MSWLFs; however, these sites indicate the extent to which older and poorly located, designed, and managed landfills can harm the environment. Current data indicate that 70 percent of existing MSWLFs were in operation prior to 1980.

The State data, case study information, and NPL study were supplemented by a risk assessment of MSWLFs (Ref. 10). The risk assessment was completed using the Subtitle D Risk Model, which was developed to evaluate the risks and resource damage associated with ground-water contamination at MSWLFs and to identify the factors that affect the nature, extent, and severity of environmental impacts from these facilities. The model simulates pollutant release, fate, and transport; exposure; impacts; and corrective action. The model is described in more detail in Section XI of this preamble.

Caveats to the risk and resource damage analysis results presented in the risk assessment need to be recognized. First, the risk and resource damage modeling includes considerable uncertainty. The model components that introduce the most uncertainty are those that predict leachate quality for trace organics, the probability and consequences of containment system failure, and the human health risk resulting from exposure to toxic substances (e.g., the dose-response models). Second, the model estimates effects from new landfills, but does not analyze the risk and resource damage impacts from existing facilities.

The risk analysis estimates the human health risk for the maximum exposed individual (i.e., the mean of the average lifetime risk over the 300-year modeling period of the facility) and the total population using ground water as a drinking water source within one mile of the facility. Current data indicate that 54 percent of existing MSWLFs have no downgradient drinking water wells within one mile, a finding that strongly influences model results because current data and model limitations do not allow the risk to be estimated at facilities with drinking water wells beyond one mile. Thus, under this model, such facilities are considered to pose no risk.

Using the well distribution indicated by the MSWLF survey (i.e., no drinking water wells located within one mile of 54 percent of the landfills), the risk model estimates that, in the baseline, fewer than 1 percent of MSWLFs pose risk greater than $1\times10_{-4}$ (i.e., an exposed individual would have a greater than one in ten thousand chance of contracting cancer in his or her lifetime as a result of the exposure), 5.5 percent pose risk in the $1\times10_{-5}$ to $1\times10_{-4}$ range, and 11.6 percent pose risk in the $1\times10_{-6}$ to $1\times10_{-5}$ range. Overall, approximately 17 percent of MSWLFs pose risks greater than $110\times_{-6}$. Out of the eight leachate constituents modeled, the three principal constituents contributing to human health risk are vinyl chloride, 1,1,2,2-tetrachloroethane, and dichloromethane.

For landfills located within one mile of a drinking water well (46 percent of all landfills), 14 percent pose risk exceeding $1\times10_{-5}$, and nearly 40 percent pose risk greater than $1\times10_{-6}$. If future wells are located near existing MSWLFs (or new sites are located near current wells), the overall risk distribution may be closer to the estimates for this subgroup. The overall risk distribution changes significantly if it is assumed that all drinking water wells are located at the facility boundary (assumed to be 10 meters from the landfill unit). Using this conservative scenario, it is estimated that approximately 35 percent would pose risk greater than $1\times10_{-5}$, and about 67 percent of MSWLFs would pose risk exceeding $1\times10_{-6}$.

Because risk is the result of a complex interaction among many factors (some of which have not been accounted for in this analysis), no single factor is responsible for most of the variation. Thus, in addition to well distance, the results of the analysis identified other risk-contributing factors, which include infiltration rate, facility size, and aquifer characteristics. These factors are similar to those identified in the case studies discussed above. More detailed discussion of EPA's risk assessment is provided later in this preamble.

b. Sewage Sludge Disposal in MSWLFs. EPA estimates that approximately 6,800 POTWs dispose of their sludge in MSWLFs. This represents the sludge disposal practice used by 44 percent of all POTWs. The total volume of co-disposed sewage sludge is slightly under 3 million tons per year, which is approximately 40 percent of the volume generated annually by POTWs.

EPA has not performed a separate risk assessment addressing the sludge component of municipal solid waste landfills. Sludge typically is a small component of the landfill (i.e., 5 percent). It is not technically feasible to monitor separately the fate and transport of the sludge and its constituents from the fate and transport of other wastes in the landfill and their constituents. Moreover, while there has been some research on the interaction of sludge and other wastes in a co-disposal situation, there are as yet no definitive results from such work. Therefore, the discussion above on the practices and risks associated with MSWLFs constitutes the best current information on those landfills that receive sludge together with the other wastes.

c. Industrial Subtitle D Facilities. In 1985, about 28,000 industrial solid waste land disposal facilities handled approximately 7.6 billion tons of waste. Although few data on specific health and environmental impacts of these facilities are available, the large volume of waste and number of facilities present concerns about actual and potential threats from these facilities. More than half of these facilities are surface impoundments, which create concerns because of the mobility and physical driving force of liquids in impoundments and the current limited use of design controls. Current data are insufficient, however, to determine the extent of potential problems.

Study results indicate only sporadic use of design and operating controls at industrial solid waste landfills and surface impoundments, with only 12 percent and 22 percent, respectively, employing any type of liner system. Study findings also revealed that few of these facilities have monitoring systems and only 35 percent were inspected by States in 1984, the latest year for which data are available.

Limited data on violations of State requirements, coupled with these statistics on design and operating controls, suggest that releases may be occurring, but more data are needed to determine the impacts of industrial Subtitle D facilities. The notification and exposure information requirements in Part 257 proposed today are a first step toward gathering this information.

B. State Controls on Solid Waste Management

Through the State Census, EPA gathered information on State Subtitle D programs in areas such as organization and resources, regulations and permit programs, and enforcement. In addition, EPA completed a detailed review of State regulations in 1984 (Ref. 25) and a supplemental review in 1987 (Ref. 9). The following is a brief overview of State solid waste regulatory programs.

MSWLFs are the Subtitle D facilities most closely regulated by the States. Most States and Territories impose some set of overall facility performance standards; however, among the States and Territories, specific design and operating standards vary greatly. For example, the 1987 regulatory review determined that 24 States and Territories require liners and 27 States and Territories require leachate collection systems. As of 1984, 28 States and Territories required gas control systems, and 38 specified some sort of run-on/run-off controls. Nearly all allow case-by-case exemptions and variances.

Many States and Territories impose some location standards or restrictions on MSWLFs. These usually include floodplain siting restrictions, which range from prohibitions on siting in the 100-year floodplain to specific design or performance standards for operations within the floodplain to a general directive to avoid sites subject to flooding. Although minimum distances from surface and ground waters and from airports and utility lines sometimes are specified, they too vary widely. For example, prescribed distances from habitable residences vary from 200 feet to three-quarters of a mile and required distances from community water supplies range from 400 feet to one mile.

Thirty-eight States and Territories specifically require ground-water monitoring systems, and an additional 12 States have general authority to impose ground-water monitoring on a site-specific basis. With regard to corrective action, 21 States have requirements in their regulations, while 22 others have general authority to impose corrective action. Approximately half of the States and Territories require methane gas monitoring and/or surface water monitoring. While most States and Territories have general guidelines or requirements for facility closure and post-closure maintenance requirements, these requirements vary widely in stringency. Finally, some form of financial assurance for closure and post-closure care is required in about half of the States and Territories.

As can be seen from the above information, there are certain gaps in some State and Territorial regulatory programs, which may result in inadequate protection of human health and the environment in some parts of the country. In some cases, the gaps in State and Territorial programs may be linked both to the inadequate implementation of the existing Federal Criteria by certain States and Territories and to the absence of certain key regulatory provisions in the current Federal Subtitle D Criteria themselves. For example, the current Criteria do not require ground-water monitoring or monitoring for methane releases, so MSWLF owners and operators may choose not to install monitoring devices (if the State or Territory does not specifically require them) and thus may not detect problems before significant problems have occurred. The existing Criteria also do not require corrective measures in the event contamination above levels of concern occurs. Furthermore, MSWLF owners and operators are not required to provide continued protection of human health and the environment through effective closure procedures and post-closure care. Agency experience since 1979 in both the hazardous waste regulatory program and response actions under Superfund has confirmed the importance of such preventive measures for long-term protection of human health and the environment.

C. Need for Revisions to the Part 257 Criteria

The evidence briefly described above indicates that MSWLFs, when improperly designed and operated, may present threats to human health and the environment. The evidence further indicates that the Federal Criteria are missing several key regulatory provisions. These provisions include location restrictions, ground-water monitoring, and corrective action, which all are mandated by HSWA. In addition, current data point to the need for the addition of methane monitoring, closure and post-closure care, and financial assurance requirements. The Agency believes that the available data clearly indicate that the current Federal Criteria have not proved adequate to protect human health and the environment and must be revised to ensure such protection.

These revisions to the Subtitle D Criteria come at a time when heightened concern is directed at issues of solid waste management. This concern derives from State, Territorial, and local government difficulties in ensuring adequate capability for municipal solid waste management as well as public concern regarding potential hazards presented by waste disposal facilities. EPA is aware of the crisis in solid waste management and believes that these proposed Criteria revisions should be a major step toward alleviating public concern with respect to inadequate controls on solid waste disposal. In addition, EPA believes these proposed revisions provide States and Territories with the flexibility needed to address the practicable capacity of the regulated community.

IV. Public Participation in This Rulemaking

Given the number and diversity of MSWLFs and the potentially significant impacts that the revised Criteria may have on them, EPA involved the public and private sector in the rulemaking process. This effort included public meetings and outreach activities aimed at encouraging participation in the process.

Since the spring of 1985, EPA has hosted or participated in a series of public meetings, workshops, conferences, and other activities focusing on issues in the Subtitle D program. In August 1985, EPA sponsored a conference explaining the major provisions of the Hazardous and Solid Waste Amendments of 1984 that affected three key RCRA programs—Subtitle D, small quantity generators, and underground storage tanks. During the conference, EPA held workshops on the following Subtitle D issues: 1) Identification of available information and case studies, 2) ground-water monitoring and protection requirements, 3) closure and post-closure care and financial responsibility requirements, 4) waste restrictions and liquids management requirements, and 5) liner and location requirements. The workshops provided a forum for EPA and the participating State and local governments, public interest groups, industry, and trade associations to exchange information and discuss significant regulatory issues.

On June 27, 1986, EPA hosted a public meeting in Washington, DC, on the issues and options being considered for the revisions to the Subtitle D Criteria. At that time, EPA presented the Agency's initial thinking on the revised Criteria, solicited comments, and responded to questions from representatives of States, local governments, public interest groups, and private organizations.

On November 18 to 20, 1986, EPA held a three-day conference in Arlington, Virginia, on solid waste disposal facilities and HHW collection programs. At this conference, EPA presented interim results of the Subtitle D Study, reported on the status of the Subtitle D Criteria revisions, and discussed issues associated with HHW collection programs. Conference participants also made presentations on State regulatory perspectives and public- and private-sector views.

EPA also sponsored a series of policy discussion meetings in 1986 involving high-level representatives of the principal interest groups affected by the Subtitle D program, including State and local governments, citizen and environmental groups, and industry and trade associations. The broad objectives of these meetings, which were coordinated for EPA by the Conservation Foundation, were to examine the effectiveness of the Subtitle D program, identify issues likely to affect implementation of the revised Criteria, and suggest innovative strategies to address problems identified.

V. Scope and Structure of Today's Proposal

The revised Criteria EPA is proposing today vary considerably in scope and content from the current Criteria in Part 257. This section explains the basis for EPA's decisions with respect to the scope and structure of today's proposal.

A. Scope of the Existing Part 257

The existing Part 257 Criteria are applicable to all solid waste disposal facilities and practices regulated under Subtitle D of RCRA. With certain exceptions listed in § 257.1(c), the Criteria apply to all types of facilities (i.e., landfills, surface impoundments, land application units, and waste piles) used for disposal of solid waste, as well as all types of solid wastes (i.e., municipal, industrial, commercial, agricultural, mining, and oil and gas waste) regulated under Subtitle D of RCRA.

Part 257 also applies to the disposal of sewage sludges from POTWs, but the Agency currently is developing specific standards for managing POTW sewage sludge under section 405(d) of the CWA.

These standards will establish pollutant concentration limits and management practices for sludge monofills, land application units, (including distribution and marketing), incineration, and ocean dumping. The Agency plans to propose these standards in 1989. At that time, EPA will propose amending Part 257 to exclude POTW sewage sludge from its requirements. As previously discussed, today's revised Criteria proposal governs the co-disposal of sewage sludge with household wastes.

B. Scope of Today's Proposal

HSWA directs EPA to develop revisions to the Part 257 Criteria for the subset of solid waste disposal facilities that "may receive hazardous household wastes or hazardous wastes from small quantity generators." Congress thus identified for EPA the scope of the revised Criteria. Based on the studies performed to date, EPA has found that the HSWA-mandated scope includes all MSWLFs, which may receive HHW and SQG hazardous waste, and some industrial solid waste disposal facilities and certain other Subtitle D facilities, which may receive SQG hazardous waste. However, as noted above, EPA has obtained extensive information on only the characteristics of MSWLFs and the risks they may pose to human health and the environment. Neither EPA nor the States have comparable information on industrial solid waste disposal facilities at this time. For this reason, EPA has decided to undertake the revisions to the Part 257 Criteria in phases.

The first phase will apply to MSWLFs (landfills that receive household waste) and is the subject of today's proposal. A second phase will apply to industrial solid waste disposal facilities (disposal facilities that receive solid waste generated by manufacturing or industrial processes), including those that receive SQG hazardous waste, and will be proposed at such time as EPA has adequate data on which to base its decisions. Because of EPA's concern about industrial solid waste disposal facilities (including landfills, surface impoundments, waste piles, and land application units), however, EPA already has initiated data collection, described later in this preamble, to determine the potential impacts of certain of these facilities. In addition, EPA today is taking the first regulatory step in addressing industrial facilities by proposing to require notification and exposure information from owners and operators of certain of these facilities. The Agency recognizes that additional regulatory efforts will be necessary to regulate other disposal facilities not included in the first two phases.

C. Structure of Today's Proposal

Because today's proposal is substantially different in scope and content from the Part 257 Criteria, EPA has chosen to create a new Part 258 for the revised Criteria the Agency is proposing today. EPA considered simply amending Part 257 to include the revised Criteria for MSWLFs, but decided against that option because of the confusion that might be created by having Criteria of general applicability alongside revised Criteria applicable only to MSWLFs. Placing the revised Criteria in a separate Part 258 tracks the distinction made by Congress, which indicated that the revisions only apply to facilities that may receive HHW or SQG hazardous waste. It also leaves the Part 257 Criteria in place for all other solid waste disposal facilities besides MSWLFs.

D. Scope and Effect of Today's Proposal on MSWLFs That Co-dispose of Sludge

The regulations proposed today would apply, under the authority of section 405 (d) and (e) of the Clean Water Act, to all MSWLFs that co-dispose of sludge. Section 405(d) requires EPA to promulgate regulations providing guidelines for the use and disposal of sludge. In general, these regulations must identify numerical limitations and management practices that are adequate to protect public health and the environment from reasonably anticipated adverse effects; however, if, in EPA's judgment, it is not feasible to prescribe or enforce a numerical limitation for a pollutant, EPA may instead promulgate a design, equipment, management practice, or operational standard, or combination thereof, that in EPA's judgment is adequate to protect public health and the environment from reasonably anticipated adverse effects.

Today's proposal reflects EPA's tentative determination that it is not feasible to prescribe concentrations of pollutants in co-disposed sludge that are protective of public health and the environment. Sludge typically is a minor portion of a co-disposal MSWLF (e.g., 5 percent). It is not feasible to separately evaluate the fate, transport, and health and environmental effects of the sludge as distinguished from the remaining majority of wastes in the landfill. Nor does it make sense to try to regulate this small portion of a landfill's waste on a concentration basis, while regulating the entire landfill on a comprehensive management basis. EPA has concluded that today's proposal, which establishes a variety of management and operation requirements (including numerical limitations in the form of ground-water protection standards), will protect public health and the environment from reasonably anticipated adverse effects.

A significant effect of the promulgation of these regulations under section 405(d) of the CWA would be the renewed eligibility of certain POTWs to grant removal credits to their industrial users under section 307(b) of the CWA. Section 307(b) requires EPA to promulgate pretreatment standards for industrial users of POTWs. Section 307(b) also allows an individual POTW to relax these standards for its industrial users by giving them a "removal credit" reflecting the POTW's removal capability, provided that the credit will not prevent the POTW from using or disposing of its sludge in accordance with section 405(d) of the CWA. EPA has promulgated removal credit regulations in 40 CFR Part 403. On April 30, 1986, the United States Court of Appeals for the Third Circuit invalidated the version of the removal credits regulations promulgated in 1984. (*Natural Resources Defense Council* v. *EPA*, 790 F.2d 289 (3d Cir. 1986).) EPA has amended the regulations to respond to all but one of the Third Circuit's four holdings (52 FR 42434, November 5, 1987).

The Third Circuit's fourth holding was that EPA may not authorize POTWs to grant removal credits to their industrial users until EPA promulgates the sludge regulations required by section 405(d) of the CWA. EPA considers the regulations proposed today to respond adequately to the Third Circuit's decision with respect to POTWs that dispose of all their sewage sludge through co-disposal in MSWLFs. These regulations would comprehensively regulate this sludge disposal practice; no further regulation of this practice is required by law or contemplated by the Agency. Thus, upon promulgation of today's regulations, the POTWs that dispose of all their sludge in co-disposal MSWLFs may apply to EPA for removal credits authority, and EPA may grant such authority to any POTW that complies with the procedural and substantive requirements of the removal credits regulations.

VI. General Approach to Today's Proposal

EPA's primary goals in developing today's proposal were to develop standards that are protective of human health and the environment, that are within the practicable capability of the regulated community, and that provide State flexibility in implementation. In order to meet these goals, EPA considered four options for the approach to today's proposal. First, EPA considered uniform design and operating standards for application to all MSWLFs. Second, EPA considered a performance standards approach that defines goals for the design and operation of MSWLFs. The third and fourth options are methodology-based decision frameworks for determining design and operating requirements. In the third option, facility requirements are specified for facilities in various location categories. The fourth option utilizes a risk assessment algorithm to delineate the necessary design and operating controls. These options are not necessarily mutually exclusive; given that this proposal contains many facets, different options could be employed for different parts of the rule (e.g., performance standards for location requirements and a methodological approach to design requirements). However, in general, EPA chose the performance standards approach for today's proposal.

The uniform national design and operating standards option would impose specific design standards and operating requirements on all units regardless of location and other relevant factors. The Agency believes that such an approach would not adequately account for variability across the country. For instance, this approach would require EPA to assume that all facility locations are "poor" and impose comprehensive design standards on all facilities based on what is necessary to protect human health and the environment in the "poorest" of locations. A rule that does not take into account site-specific location characteristics would likely over-regulate MSWLFs in "good" locations; however, a uniform standards approach may be easier to implement and enforce by States because of the specificity of the standard.

The Agency also considered adopting the uniform national standards option with variances, in order to account for site-specific characteristics. Under this option, variances would be granted if the owner or operator could demonstrate that equivalent protection is provided by site-specific location, design, and operating characteristics. This approach parallels the one adopted for hazardous waste facilities under Subtitle C of RCRA, which imposes virtually identical requirements (e.g., double liners and leachate collection systems) at all new hazardous waste landfills. Variances are then allowed, under Subtitle C, based on an adequate demonstration by the owner or operator that the specific standard is not necessary. While variances add some flexibility, EPA has two concerns about this approach. First, variance demonstrations often require substantial resources on the part of the owner and operator and the States. Second, EPA is concerned that public pressure would limit State or local flexibility in granting variances, even though they may be warranted for a specific site. While this option might provide a high assurance of protection of human health and the environment, it could over-regulate some facilities by requiring unnecessary controls. In addition, this approach does not fully take into account the practicable capability of the regulated community.

The second approach considered was to impose overall performance standards for each facility requirement. These performance goals or standards would require site-specific analyses to determine appropriate controls. EPA chose this approach for this rulemaking because it allows the greatest flexibility for the State to consider numerous location-specific factors in tailoring facility requirements. In addition, performance standards are less disruptive of existing State programs and give facilities some needed latitude to meet requirements within the bounds of their practicable capability. Finally, a performance standard, as opposed to a strict design standard, allows for the consideration of innovative technologies that may be developed in the future.

The third approach, a methodological one, was to impose a decision framework based on location categories to determine the applicable requirements for a specific facility. This approach would categorize all locations on the basis of certain characteristics, then set individual requirements for each category. Under this approach, appropriate requirements could be matched to specific categories of locations. Methods of establishing location categories and their corresponding requirements would be specified in the revised Criteria; then States, using information submitted by the owner or operator, could determine the category and apply the associated requirements to a given facility. A key advantage to the categorical rule approach is that it establishes uniform criteria for matching requirements to potential problems. For example, facilities in areas of the country characterized by abundant rainfall could be required to collect generated leachate. Conversely, facilities in the more arid areas of the country do not necessarily generate leachate in quantities sufficient to warrant leachate control systems, and could be regulated accordingly.

The Agency believes this categorical requirements approach would provide protection without over-regulation; however, a complex, sophisticated scheme would be necessary to address every location consideration and to match appropriate requirements. Furthermore, it would be difficult to develop a technically defensible approach for all requirements for MSWLFs, particularly those requirements that necessitate site-specific analyses (e.g., ground-water monitoring). In addition, this approach would restrict State flexibility because it would specify which designs are necessary for each location.

The fourth option, also a methodological approach, is based on a risk assessment algorithm. This approach would require the use of a predictive equation to determine the necessary facility requirements. The predictive equation would include some simplifying assumptions, but would utilize site-specific values for some of the parameters. Like the categorical approach, this option has the advantages of employing a uniform national standards approach that could be easy to implement; however, it would be difficult to develop a technically sound risk algorithm and could restrict State flexibility.

EPA intends to provide guidance on how to design MSWLFs to meet the proposed performance standards. The agency believes the categorical approach is one viable method for determining landfill design, and is considering developing this method as guidance along with the risk algorithm method. Both of these approaches to design requirements are discussed in more detail in section IX.D of this preamble. The Agency requests comments on the approach proposed today and on the alternatives presented.

VII. Major Issues

A. Ground-Water Resource Value

Resource value refers to the current and future importance of ground water as a water supply and as an ecological resource. Highly saline ground water or ground water with very low yield may have a low resource value. Pristine ground water or ground water in high demand that cannot easily be replaced or restored similarly may have a high resource value. As EPA was developing the framework for the revised Criteria, the Agency considered at length the subject of differential protection of ground water based on its resource value. Specifically, EPA considered applying different engineering controls, monitoring, and corrective action requirements according to the resource value of the ground water.

In 1984 EPA issued the Ground-water Protection Strategy, which established the concept of differential protection of ground water depending on its resource value. Accordingly, three classes of ground water were identified. Class I ground waters are defined as special ground waters that are highly vulnerable to contamination and that are either irreplaceable sources of drinking water or are ecologically vital. Class II ground waters are defined as current and potential sources of drinking water and those having other beneficial uses. Class III ground waters are defined as heavily saline ground water or ground water otherwise contaminated beyond the level allowing cleanup through methods commonly used by public water supply treatments. The Agency expects to issue final Guidelines for Ground-Water Classification during 1988. States then may use this document for reference in making ground-water classification and resource evaluation decisions.

With respect to facility design for MSWLFs, today's proposal would establish facility design Criteria that give States the flexibility to address the value of ground-water resources in setting facility-specific design requirements. Section IX.D of today's preamble describes the Agency's approach for incorporating resource value considerations into facility design decisions. EPA is not mandating use of the ground-water classification system set forth in EPA's Ground-water Protection Strategy. Rather, under this proposal, States would have the discretion to assess the value of ground-water resources. In developing Subtitle D guidance in the future, however, the Agency may draw upon the Guidelines for Ground-Water Classification to provide examples of appropriate resource evaluation and classification decisions.

The Agency also is proposing to allow consideration of resource value in the corrective action and, to a lesser extent, the ground-water monitoring components of today's rule. Specifically, today's proposal would allow the ground-water protection standards to be adjusted by States in situations where MSWLFs are located over aquifers that meet certain conditions (see section IX.E of today's preamble). These conditions include the following: (1) The aquifer is not a current or potential source of drinking water; and (2) the aquifer is not interconnected with waters to which the hazardous constituents are migrating or are likely to migrate in a concentration(s) that represents a statistically significant increase over background concentrations. Adjustments made to the ground-water protection standard or cleanup standard would be made on a site-specific basis by the State after determining that the above conditions are met. Furthermore, the time allowed for corrective action could vary based on the value placed on the ground water.

In addition, EPA is proposing that any frequency of ground-water monitoring (above the minimum required) be specified by the State based on site-specific factors, including the resource value of the ground water. The proposed approach, however, would not allow exemptions from all ground-water monitoring for facilities located over low value ground water. The Agency believes that at least minimal ground-water monitoring is necessary at all MSWLFs to evaluate the performance of facility design and operation and to identify potential threats to human health and the environment. Furthermore, HSWA specifically mandates that the revised Criteria require ground-water monitoring as necessary to detect contamination at facilities that may receive HHW or SQG waste. The Agency requests comment on whether ground-water monitoring should be waived for MSWLFs located over ground water of low resource value.

Finally, EPA believes ground-water resource value already plays an important role in local and State decisions regarding the siting of MSWLFs. In this proposal EPA has not established Federal siting Criteria specifically based on resource value because EPA recognizes that resource value considerations in facility siting are more appropriately made at the State and local levels.

The Agency also recognizes that many States are implementing various ground-water protection strategies, including wellhead protection programs. EPA believes today's proposal provides the States the flexibility to implement these programs and encourages them to increase certain requirements, as necessary, to meet the objectives of their wellhead protection programs. These requirements could range from more stringent design controls for mimimizing migration out of a unit to establishing certain location restrictions, such as minimum setback distances from vulnerable municipal well fields.

Comments are requested specifically on how the resource value of ground water should be accounted for in setting the various requirements proposed today for MSWLFs.

B. Exclusion of Closed MSWLFs

EPA considered whether to apply the requirements proposed in Part 258 to MSWLF units that close prior to the effective date of the final rule. Closed units are defined in § 258.2 as those units that no longer receive wastes and have a final layer of cover material. EPA believes that inclusion of closed facilities in this rulemaking would raise numerous technical, legal, and implementation complexities that could not be resolved within the time frame of this rule. For example, inclusion of closed units could overtax State implementation capabilities because identification of closed facilities would be difficult and time consuming and complicated by issues such as changes in ownership. Thus, EPA proposes that closed units be excluded from regulation at this time. The Agency is in the process of examining questions regarding closed facilities, however, and will consider further action once this effort has been completed.

According to the State Census, a reported 32,000 closed solid waste disposal facilities are located across the U.S., but EPA does not know how many of these are closed MSWLFs. In the absence of closed MSWLF regulations, these facilities, which represent potential threats to human health and the environment because of their number and because many were poorly designed and managed, may be addressed under EPA's Superfund program or by RCRA enforcement provisions for imminent hazards.

Because the Agency is concerned about closed MSWLFs, EPA today encourages each State to develop a long-term regulatory strategy to deal with these closed facilities. EPA believes that developing a closed MSWLF strategy should include at least the following steps: 1) Review of the State's legal authority to address closed facilities; 2) an inventory of closed facilities to identify the location of these facilities and to gather available information on facility age and size, waste types disposed of, and known local ground-water usage; 3) ranking of sites by the present danger to human health and the environment; 4) determination of the adequacy of the existing regulatory controls for closed sites and their ability to respond to any problems; and 5) use of the available legislative and regulatory authorities to address problems identified with closed sites. EPA specifically is interested in comments on Federal and State strategies that may be used in addressing these closed MSWLFs.

C. Practicable Capability

The Congressional directive to revise the existing Criteria (§ 4010 of RCRA as amended) states that EPA may consider the "practicable capability" of owners and operators of facilities that may receive HHW or SQG waste in determining what these revisions should entail. Congress recongnized that the universe of owners and operators of solid waste disposal facilities included many with limited economic and technical capabilities. For example, many MSWLFs are owned and operated by small local governments with limited resources. Development of today's proposal, therefore, included an analysis of how the "practicable capability" of owners and operators should be taken into account when setting appropriate controls for protection of human health and the environment.

The Agency believes that practicable capability encompasses both technical and economic components. The technical component includes both the availability of technology for addressing a particular problem (i.e., technical feasibility), as well as the technical capability of the owner or operator to implement that technology. The economic component refers to the economic resources available to the owner or operator to implement the revised standards.

To assist in characterizing the practicable capability of MSWLFs, EPA collected data on waste disposal, demographics, landfill size, and landfill ownership. These data indicate that most MSWLFs handle relatively small volumes of municipal solid waste (measured in tons per day). EPA estimates that 52 percent of all landfills manage less than 17.5 tons per day (TPD) and account for less than 2 percent of the waste handled by all MSWLFs. However, the largest landfills (2.6 percent of all MSWLFs) handle more than 1,125 TPD and manage 40 percent of all municipal landfill waste.

These data also clearly indicate that most MSWLFs are located in rural areas and these MSWLFs typically serve a limited number of communities relative to landfills located in more urban areas. EPA matched 1982 Census data with geographic location data (longitude and latitude coordinates) to determine whether landfills are located in low- (rural) or high- (urban) density counties. EPA estimates that 69 percent of existing landfills are in counties with population densities of fewer than 100 people per square mile, supporting the conclusion that most landfills are located in "rural" areas. In addition, EPA Facility Survey data (Ref. 36) show that, on average, only 1.8 communities share a landfill at the village or town level, but that at the city level, there are 3.8 communities per landfill.

To address the economic component of practicable capability, EPA assessed the financial capability and current spending practices of municipal governments. EPA assembled financial and demographic data from the "1982 Census of Governments" and the "1983 County and City Data Book." Based on the 1982 Census data, EPA estimates that communities typically spend less than 1 percent of their budgets on solid waste disposal. In comparison with other municipal services, costs at this level represent a very small obligation. For example, as an average percentage of total community expenditures, communities spend 36 percent on education, 5 percent on police protection, and 3 percent on sewage disposal. The 1982 Census data also were used to develop a composite score of nine various financial and economic vitality measures. This score categorizes communities' financial capabilities as weak, average, or strong. EPA used the score to assess the baseline financial condition of governments and the economic impact of various regulatory scenarios. The development and categorization of the composite score and the economic impact analysis is described in detail in Section XI of this preamble and in the draft regulatory impact analysis for today's proposal.

EPA believes that significant disruptions of solid waste management could result unless these technical and economic factors are taken into account where necessary. The Agency, therefore, examined the range of MSWLFs to determine which, if any, might be especially susceptible to technical difficulties or economic hardship. Owners and operators of two classes of MSWLFs were identified as possible candidates for consideration of practicable capability—existing MSWLF units and small MSWLFs.

EPA estimates that there are more than 6,000 MSWLFs currently in operation. Of these existing facilities, about 20 percent are expected to close before 1990 and almost 75 percent are expected to close within 15 years (Ref. 10). EPA evaluated whether requirements should be the same for these facilities as for new MSWLF units.

Regulating new and existing MSWLF units differently allows consideration of practicable capability of the existing MSWLF, although some problems at existing facilities may not be addressed if these units face less stringent requirements. Regulating new and existing units the same way, while conceptually offering greater assurance of protection, could impose very high costs, creating implementation difficulties and posing the prospect of solid waste management disruptions. Comments that EPA received prior to proposal from States, industry groups, and private firms favored different requirements for new and existing units.

Based on these considerations, EPA is proposing today to vary some requirements for new and existing landfill units. These differences fall in three major areas. First, the majority of the location restrictions proposed today would be applicable only to new landfill units (that is, units that have not received wastes prior to the effective date of the rule). EPA believes the application of today's location restrictions to existing units would result in significant disruption of solid waste management in certain areas of the country. However, existing units would be required to comply with the unstable area restrictions (§ 258.15) because the Agency believes these areas pose particular concerns for protection of human health and the environment.

Second, today's proposal does not require that existing units be retrofitted with liners and leachate collection systems. EPA believes that such a requirement would: (1) Exceed the economic capabilities of the majority of owners and operators of existing facilities, (2) present additional public health problems from the excavation of waste, and (3) disrupt existing solid waste management activities.

Third, today's proposal provides a phase-in period of 18 months for all requirements not only to allow States to put in place revised regulations, but also to provide lead time for owners and operators to comply with the new requirements. Furthermore, additional phase-in time is provided for ground-water monitoring due to the resources needed by States and owners and operators to implement this provision. Detailed discussion of the ground-water monitoring provision is provided in Section IX.E of this preamble.

In today's proposal, EPA has not varied requirements for new and existing units in cases where such requirements are equally feasible, technically and economically, at both new and existing landfill units, except existing facilities would have more time to comply with certain requirements. For example, the operating criteria (Subpart C) and ground-water monitoring and corrective action requirements (Subpart E) are applicable equally to new and existing units, although new facilities must comply with Subpart E's ground-water monitoring requirements before they can accept wastes, while existing units may have up to five years to comply.

EPA also considered varying requirements for small MSWLFs. The Agency estimates that, of the approximately 6,000 active MSWLFs, just over half handle 17.5 TPD or less (Ref. 10). In contemplating whether to regulate small MSWLFs differently from large ones, EPA determined that practicable capability considerations did not outweigh potential health and environmental threats. Specifically, the Agency believes that size represents only one factor in determining potential risk, and that other variables, such as design and operating controls, location and climate characteristics, and waste streams, can be significant determinants of risk regardless of MSWLF size. Based on the risk assessment for this rulemaking, EPA concluded that no single factor factor is responsible for most of the variability in risk across MSWLFs; rather, there is a complex interaction among the factors that govern leachate flux and flow through the underlying aquifer (Ref. 10). As a result, EPA is not proposing any special exceptions for small MSWLFs. However, the Agency believes that today's proposal provides States adequate flexibility to address particular site-specific conditions present at MSWLFs, including small MSWLFs. In addition, the 18-month phase-in period, along with a State-specified ground-water monitoring compliance schedule, should provide owners and operators of small MSWLFs adequate time to comply with the requirements proposed today or to make other arrangements for solid waste disposal.

D. Extent of the Criteria Revisions

HSWA directs that, at a minimum the Criteria revisions require "groundwater monitoring as necessary to detect contamination, establish criteria for the acceptable location of new or existing facilities, and provide for corrective action as appropriate." The statute further specifies that the revised Criteria shall be "those necessary to protect human health and the environment and may take into account the practicable capability of solid waste disposal facilities." Because of EPA's mandate to protect human health and the environment, the Agency was not confined to these minimum statutory requirements (i.e., location restrictions, ground-water monitoring, and corrective action requirements) in developing today's proposal. Limiting the Criteria revisions to the statutory minimum would omit important preventive measures (e.g., gas controls) necessary for long-term protection of human health and the environment. Moreover, exceeding the mimimum reduces the reliance on detection systems for protecting human health and the environment and thus results in a higher level of protection.

Furthermore, going beyond the statutory minimum allows the Agency to consider other requirements that can prevent failures and corrective actions, even though these additional requirements may add costs for preventive measures at facilities that would not have failed and thus did not need the preventive measures; however, the Agency has taken into account the practicable capability of municipal solid waste landfills in specifying the required level of environmental controls.

During the development of these Criteria revisions, EPA received comments on whether or not the revised Criteria should exceed the statutory minimum. In general, industry advocated confining the scope of the rule to the statutory minimum. Several industry associations, however, supported an expanded scope as long as flexibility was built into the rule and site-specific factors could be considered in determining what controls should be imposed. State views were divided. Some preferred requiring the statutory minimum only, while others suggested varying subsets of additional requirements, and still others wanted comprehensive controls.

In today's action, EPA has proposed revisions that go beyond those minimally required by HSWA (i.e., location restrictions, ground-water monitoring, and corrective action). In addition to the statutory minimum, today's proposal includes an update of the design and operating criteria in the existing Part 257 Criteria, and adds new requirements for closure and post-closure care and financial responsibility. The rationale for each of these new provisions, which the Agency believes are necessary for the protection of human health and the environment, is discussed in detail later in this preamble. The Agency seeks comments on the extent of the revisions proposed today.

E. Requirements for Facilities Other Than MSWLFs

EPA is concerned about the estimated 28,000 industrial solid waste disposal facilities and 2,600 construction/demolition waste landfills, as discussed previously. However, today's proposal would limit the applicability of the revised Criteria to MSWLFs because there are insufficient data currently available to develop requirements for these other facilities. For this reason, the Agency considered the information-reporting requirements that might be appropriate for identifying and assessing the risks associated with industrial waste disposal facilities and construction/demolition waste landfills, and for determining the need for additional controls on these facilities.

EPA contemplated three information-reporting options for these facilities. The first option was a notification requirement. Notification could provide information on these solid waste disposal facilities, including data on their locations, ownership, and waste management practices. This information could be used to answer basic questions about these facilities without placing significant resource demands on the owners and operators of these affected facilities or the States. This option, however, provides no specific data on the potential environmental or human health impacts posed by these facilities.

A notification requirement with an exposure information component was the second option. Facilities would be required to supply exposure information, such as distance to the property boundary and available data on the population that could readily be exposed. This information could help EPA and the States roughly assess the potential risks currently posed by these facilities and use this information to select facilities that need more careful examination and analysis. States should use this information especially to help set priorities; however, information defining potential exposed population may be of limited utility if not backed by monitoring results indicating the extent of any releases that may be occurring.

A ground-water monitoring requirement was the third option considered by the Agency. Comprehensive ground-water monitoring data could provide a strong foundation on which to base analyses in support of rulemaking applicable to facilities other than MSWLFs. However, this effort would be resource-intensive for States and much more costly to the regulated community then simpler options. Given the diversity and size of this universe of facilities, ground-water monitoring may not be necessary for all facilities. While ground-water monitoring could generate substantial data, EPA believes there are more cost-effective ways of establishing a data base for rulemaking. EPA believes that the risks posed by these facilities should be evaluated more closely before taking the significant step of requiring ground-water monitoring at all 28,000 industrial solid waste disposal facilities and construction/demolition waste landfills nationwide. The advantage of a strong information base is offset by the added costs and burden imposed on these facilities for monitoring and the resulting potential for exceeding the practicable capability of marginally profitable operations. Moreover, most States would have difficulty implementing the program due to the extensive resources it would require and the fact that even the basic data (e.g., location) on these facilities are very limited in many States.

Instead, EPA is contemplating a phased approach to data collection. The proposed amendment to Part 257, which is described in more detail in section VIII of this preamble, calls for a notification requirement with a limited amount of exposure information. Once these basic data are compiled and analyzed, the Agency can determine what further information requirements or regulatory controls should be pursued for industrial solid waste disposal facilities and construction/demolition waste landfills.

VIII. Amendments to Part 257

Today's proposal includes amendments to 40 CFR Part 257. These amendments include: (1) Conforming changes to Part 257 that would make it consistent with the proposed Part 258; (2) an update to the MCLs listed in Appendix I of Part 257; and (3) a notification requirement for certain types of facilities.

A. §§ 257.1–2 Conforming Changes to Part 257

Today's proposal adds municipal solid waste landfills to the list of exceptions to the Part 257 Criteria contained in § 257.1(c). Because MSWLFs would be covered by the proposed Part 258 Criteria, they would no longer be subject to the Part 257 Criteria that are generally applicable to solid waste disposal facilities and practices. The Part 257 Criteria would otherwise be unchanged with respect to their applicability, and would remain in full effect for all other facilities and practices.

Today's proposal also would add certain facility definitions to Part 257. Included are definitions of the four types of solid waste disposal facilities that would be regulated by the Part 257 Criteria: Landfills, surface impoundments, land application units, and waste piles. These new definitions would clarify that these types of solid waste disposal facilities are subject to the Part 257 Criteria.

B. §§ 257.3–4 Revisions to Ground-Water Requirements

EPA is proposing to update the MCLs, which are used as ground-water protection criteria in Part 257, to include any MCLs that have been established by EPA since the promulgation of Part 257 in 1979. Currently, Part 257 imposes basic environmental criteria for the protection of human health and the environment. At the time Part 257 was promulgated, the available interim MCLs for the protection of human drinking water were included as ground-water protection criteria. MCLs are developed by EPA under section 1412 of the Safe Drinking Water Act (SDWA), which was amended in 1986. Under the 1986 Amendments to the SDWA, EPA is mandated to promulgate drinking water regulations for a large number of constituents; these regulations generally include MCLs. Accordingly, this notice would revise the Part 257 regulations to include any new MCLs as ground-water protection criteria (including the MCLs for eight volatile organics that were promulgated on July 8, 1987; see 52 FR 25690). Because the development of MCLs is an ongoing process, EPA is proposing to simply reference the MCL regulations (40 CFR Part 141) directly, rather than update Appendix I, which now includes only the MCLs promulgated prior to 1979. Therefore, today's action proposes to eliminate Appendix I and to incorporate the MCLs by reference to 40 CFR Part 141. Using this approach, the Agency avoids the need to update the Part 257 Criteria every time EPA issues a new MCL. The public would have the opportunity to comment on whether it would be appropriate to use each new MCL as a ground-water protection standard under Part 257.

C. § 257.5 Notification and Exposure Information Requirements

The proposed amendments to Part 257 also include a notification and exposure information requirement for certain solid waste disposal facilities (§ 257.5). As discussed above, under this requirement, EPA intends to obtain notification and exposure information from a set of solid waste disposal facilities of particular concern: Industrial landfills, surface impoundments, land application units, and waste piles, as well as construction/demolition waste landfills.

As explained earlier, these facilities are of concern to the Agency because they represent a large and diverse set of solid waste disposal facilities, and little information is available on these facilities at either the State or Federal level. In addition, some of these sites may be used for disposal of SQG hazardous waste and may pose unknown risks to human health and the environment. EPA plans to undertake data collection efforts on these facilities to establish the basis for future rulemaking. Today's proposed requirement for notification and exposure information from these facilities is a first major step toward revising the current regulatory program for these facilities.

The information EPA is proposing to require from these facilities consists of two parts: Basic notification information for facility identification purposes and limited exposure information to be used to estimate potential risks posed by these facilities. The notification information is necessary because neither EPA nor the State have adequate information on these facilities to support fully revised Criteria for these facilities at this time. EPA's recent survey of the States clearly indicates the scarcity of data on industrial solid waste disposal facilities and construction/demolition waste landfills. The proposed notification requirement would provide EPA and the States the mechanism to identify the universe of facilities and, at the same time, indicate to the facilities that they are subject to Subtitle D.

The notification also would request very basic data for determining the potential risks the facilities present to human health and the environment. For example, in addition to seeking general facility information, the proposed notification includes two questions relating to the potential risks posed by the facility: The number of households within one mile of the facility, and the number of on-site monitoring wells. Information submitted in response to these risk-based questions could be used by the States in setting priorities for inspections and other activities. EPA requests comments on whether to include other risk-related questions in the proposed notification, such as questions concerning the use of local waters (ground and surface), the number of local drinking water wells, and the number of municipal water intakes downstream from the facility. In addition, EPA requests comments generally on the appropriate questions to be included on the notification form, and whether the form should be sent to both EPA and the State.

The proposed notification and exposure information requirement is only one part of EPA's data collection efforts with respect to industrial solid waste disposal facilities. The Agency recently has completed a major telephone survey, and other efforts are under consideration, such as an in-depth mail survey, a closer examination of State regulatory programs, and collection of available ground-water monitoring data. The Agency intends to develop revised Criteria for these facilities as soon as adequate data are available to support rulemaking.

IX. Section-by-Section Analysis of Part 258

A. Subpart A—General

Subpart A discusses the purpose, scope, and applicability of the proposed Part 258. It provides definitions necessary for the proper interpretation and implementation of the rule and identifies what Federal laws are to be considered in complying with these rules.

1. § 258.1 Purpose, Scope, and Applicability

Part 258 sets forth minimum national criteria for the location, design, operation, cleanup, and closure of municipal solid waste landfills. An MSWLF that does not meet these criteria would be considered an open dump for purposes of State solid waste management planning under RCRA. Open dumping is prohibited under section 4005 of RCRA.

Part 258 would apply to all new and existing municipal solid waste landfills, as defined in § 258.2, except MSWLF units that closed prior to the effective date of the rule. As specified in § 258.2, a closed unit is any solid waste disposal unit that no longer receives solid waste and has received a final layer of cover material. As discussed in more detail later, the Agency believes that final covers are essential for closure of MSWLF units. This definition would ensure that the owner or operator cannot escape these regulations by simply refusing to accept additional waste and abandoning the MSWLF. Part 258 requirements do not apply to units that are created within the area of contamination during Superfund actions. In addition, Part 258 would not apply to other landfills, or surface impoundments, waste piles, or land application units used for solid waste disposal; these facilities will continue to be covered under Part 257.

Landfills that receive municipal waste combustion (MWC) ash regulated under Subtitle D of RCRA, including MWC ash monofills, would be considered municipal solid waste landfills for the purposes of this rule (see section IX.A.2 of today's preamble). Therefore, today's proposal applies to any Subtitle D landfill that receives MWC ash. However, legislation is currently pending in Congress which, if enacted, would require specific standards for the design of MWC ash disposal facilities which differ from today's proposed design requirements. In addition, the Agency is concerned that certain requirements proposed today may not be adequate or appropriate for MWC ash disposal facilities. For example, today's proposed air criteria do not specifically require fugitive dust controls during MWC ash transportation. Also, certain ground-water monitoring parameters (e.g., volatile organic constituents) and the methane gas controls proposed today for MSWLFs may not be appropriate for MWC ash monofills due to the characteristics of MWC ash. In addition, the proposed daily cover requirements may not be necessary at MWC ash monofills that utilize operating controls, such as the periodic application of moisture to the landfill surface. The Agency specifically requests comments on the adequacy and appropriateness of today's proposed requirements for MWC ash disposal.

In a separate effort, the Agency is developing guidance on MWC ash disposal. This guidance will provide additional information regarding the proper location, design, and operation of MWC ash disposal facilities.

2. Section 258.2 Definitions

Aquifer. EPA has defined aquifer for this proposal as a geologic formation, group of formations, or portion of a formation capable of yielding significant quantities of ground water to wells or springs. This definition is the same one currently used in EPA's hazardous waste program and differs from the original Criteria definition (40 CFR 257.3-4(c)(1)) only in that it substitutes the term "significant" for "usable." The Agency has selected this definition for two reasons: First, because of several comments received on the ambiguity of the word "usable," especially with respect to resource value, and second, because the delineation of the aquifer is a site-specific determination. Some concern has been expressed, however, that this new definition also is vague and that the rule should define "significant." One possible approach would be to define "significant" as a minimum sustained yield of a certain amount (e.g., one gallon per minute); however, EPA does not have sufficient information to determine the amount of ground water that must be produced to be considered "significant" in all cases and believes, therefore, that such a determination at this time would be arbitrary. EPA believes such a determination should be site-specific and has structured the definition of aquifer accordingly. The Agency specifically requests comments on this approach to defining "aquifer."

Household Waste. Any solid waste, including garbage, trash, and sanitary waste in septic tanks, derived from households is defined as a household waste. Household include single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgounds, picnic grounds, and day-use recreation areas. This definition is consistent with the RCRA Subtitle C regulations found at 40 CFR 261.4.

Lateral Expansion. The Agency has defined this term to mean any horizontal expansion of the waste boundary of an existing landfill unit. Under this proposal, lateral expansions are treated as new units and must meet the requirements applicable to new units. Under this proposed definition, any area of any existing unit that has not received waste by the effective date of this rule and later receives waste, is a lateral expansion.

Liquid Waste. Liquid waste, either bulk or containerized, is defined under proposed § 258.28(c)(2) as any waste that is determined to contain free liquids according to Method 9095 (Paint Filter Liquids Test) (Ref. 42). This method has been adopted by the Subtitle C program in 40 CFR Parts 264 and 265. Because the solids content of sewage sludge is readily determined, the Agency considered using a different definition of liquids for sewage sludge from publicly owned treatment works. Under that alternative, sludges that have a solids content of 20 percent or greater would not be considered liquid. That alternative was considered inferior to the Paint Filter Liquids Test for two reasons. First, the variability of sludges may result in certain sludges meeting the 20-percent criterion and still being in a liquid state or containing free liquids. Second, the Agency believes that the Paint Filter Liquids Test is adequate to ensure that "dry" sludges will not be eliminated from disposal at MSWLFs. However, the Agency recognizes that using a solids content measure would allow easier implementation because it is a measure commonly used by POTWs. EPA currently is conducting research to determine if a solids content measure would be an acceptable substitute for the Paint Filter Liquids Test for municipal sewage sludges. EPA specifically requests any data that will assist in evaluating the use of a solids content measure for purposes of this rule.

Municipal Solid Waste Landfill. A municipal solid waste landfill is defined as any new or existing landfill or landfill unit that receives household waste. These may be publicly or privately owned. Landfills owned by municipalities that do not accept household waste are not MSWLFs. MSWLFs also may accept other types of Subtitle D wastes, such as commerical waste, nonhazardous POTW sewage sludge, construction/demolition waste, and industrial solid waste. (Units that accept only these wastes will be addressed in future rulemaking activities.) For example, a unit that receives primarily construction/demolition waste, but also receives some household waste, is an MSWLF under this rule. This definition does not include landfills regulated as hazardous waste units under Subtitle C of RCRA and is not meant to capture industrial solid wate landfills that may receive office, sanitary, or cafeteria wastes generated at the site. Finally, the definition of MSWLFs includes any landfill that receives MWC ash including ash monofills (i.e., landfills that receive only ash from MWC facilities) to the extent that MWC ash is generated from the combustion of household waste alone or in combination with other nonhazardous wastes.

3. § 253.3 Consideration of Other Federal Laws

Section 258.3 provides that the owner or operator of an MSWLF unit must comply with any other applicable Federal laws, regulations or requirements. There are numerous other Federal laws that must be considered in siting, designing, and operating MSWLFs. The owner or operator is responsible for ensuring that the requirements of all applicable statutes and regulations, as well as any other requirements, are met. Applicable statutes include, but are not limited to, the following:

- National Historical Preservation Act of 1966, as amended.
- Endangered Species Act.
- Coastal Zone Management Act.
- Wild and Scenic Rivers Act.
- Fish and Wildlife Coordination Act.
- Clean Water Act.
- Clean Air Act.
- Toxic Substances Control Act.

B. Subpart B—Location Restrictions

EPA has identified six types of locations that require special restrictions: sites in the vicinity of airports, 100-year floodplains, wetlands, fault areas, seismic impact zones, and unstable areas. Restrictions for sites near airports and floodplains are included in the original Part 257 Criteria. EPA is proposing to add to the revised Criteria restrictions on siting in wetlands, fault areas, unstable areas, and seismic impact zones because, as discussed below, EPA believes that the additional information that has been developed and reviewed since promulgation of the current Part 257 Criteria supports the need for additional controls in these locations. References to "new MSWLFs" in this section and throughout this preamble refer to new units, as well as to lateral expansions of existing units.

1. Section 258.10 Airport Safety

Under today's proposal, new and existing MSWLFs located within the distance limits specified in Federal Aviation Administration (FAA) Order 5200.5 (10,000 feet for airports handling turbojets and 5,000 feet for airports handling piston-type aircraft) may not pose a bird hazard to aircraft. The proposed requirement is identical to the current § 257.3–8 and is included because MSWLFs receive putrescible wastes that can attract birds despite controls such as daily cover. When solid wastes are disposed of near airports, the birds attracted to the area can present a significant risk of collisions with aircraft. The FAA Order 5200.05, "FAA Guidance Concerning Sanitary Landfills on or Near Airports" (October 16, 1974) states that solid waste disposal facilities have been found by study and observation to be attractive to birds and, therefore, "may be incompatible with safe flight operations" when located near an airport. The background document relevant to this section (Ref. 2) discusses instances of damage resulting from bird strikes that have occurred near landfills.

The distances derived from Order 5200.5 are based on the fact that over 62 percent of all bird strikes occur below altitudes of 500 feet (150 meters) and that aircraft generally are below this altitude within the distances specified.

EPA wishes to make it clear that the "bird hazard" of concern is "an increase in the likelihood of bird/aircraft collisions." Thus, EPA expects that solid waste disposal within the specified distances would occur only if the operation can be managed in such a way as to not increase the risk of collision within the specified distances. EPA recommends that owners and operators of MSWLFs consult with the Fish and Wildlife Service to determine whether specific facilities pose a bird hazard to aircraft. Where appropriate, this determination should be made in consultation with FAA, as well as with the owners and operators of the airports of concern.

2. Section 258.11 Floodplains

EPA proposes to include a floodplain requirement in Part 258 that is identical to the requirement in the current Part 257 Criteria. Thus, EPA is proposing that new and existing MSWLFs located in the 100-year floodplain shall not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in the washout of solid waste so as to pose a hazard to human health and the environment. The Agency's thinking today is consistent with the rationale for the original Criteria, as discussed in 44 FR 53438, dated September 13, 1979. Namely, disposal of solid waste in floodplains may have significant adverse impacts: (1) If not adequately protected from washout, wastes may be carried by flood waters and flow from the site, affecting downstream water quality; (2) filling in the floodplains may restrict the flow of flood waters, causing greater flooding upstream; and (3) filling in the floodplain my reduce the size and effectiveness of the temporary water storage capacity of the floodplain, which may cause a more rapid movement of flood waters downstream, resulting in higher flood levels and greater flood damages downstream. For these reasons, EPA believes that it is desirable to locate disposal facilities outside floodplains. EPA estimates that 14 percent of all existing MSWLFs are located in 100-year floodplains. The Agency made this estimate by mapping MSWLFs nationwide and determining how many MSWLFs fell in areas mapped as floodplains. Case studies, discussed in the background document for this section (Ref. 2), indicate that landfills are subject to design and operational failures as a result of flooding.

Today's proposal would require that new and existing MSWLFs, if located in a 100-year floodplain, be designed and operated to prevent the adverse effects described above. EPA recognizes that locating MSWLFs in floodplains can be expected to have some impact on the flow of the 100-year flood and water storage capacity, regardless of precautions taken. The intent of today's proposed requirement is to require that

MSWLFs not cause significant impacts on the 100-year flood flow and water storage capacity. Site-specific information should be used to evalute whether a facility has met this standard.

Consistent with the original Criteria, Part 258 as proposed today would define the floodplain using the 100-year flood level. This criterion would limit the chance for site inundation and increased flood levels and damages. The intent of this criterion is the same for Part 258 as it was for the original Criteria: (1) To require an assessment of any new or existing disposal site or expansion of any existing site in a floodplain to determine the potential impact of the disposal site on downstream and upstream waters and land; (2) to prohibit such disposal activities if the site, as designed, may cause increased flooding during the 100-year flood; and (3) if the disposal site is located in a floodplain, to require the use of available technologies and methods to protect against inundation by the base flood and minimize potential for adverse effects on water quality and on the flood-flow capacity of the floodplain.

This approach conforms with the intent of Executive Order 11988, dated May 24, 1977, concerning floodplain management. Federal agencies are required to comply with this Executive Order, and State agencies are encouraged to develop and apply similar policies and to consider the provisions of the Unified National Program for Floodplain Management of the Water Resources Council in formulating and applying State policies.

In order to determine whether a unit is located in the 100-year floodplain, owners and operators should use flood insurance rate maps (FIRMs) developed by the Federal Emergency Management Agency (FEMA) under the Federal Insurance Administration (FIA) pursuant to the National Flood Insurance Act of 1986. FEMA has developed FIRMs for approximately 99 percent of the flood-prone communities in the United States. FIRMs can be obtained at no cost from the FEMA Flood Map Distribution Center, 6930 (A–F) San Tomas Road, Baltimore, Maryland, 21227–6227. In areas of the country where FIRMs are not available, there are numerous other sources of floodplains maps, which include: The U.S. Army Corps of Engineers, the Soil Conservation Service, the National Oceanic and Atmospheric Administration, the U.S. Geologic Survey, the Bureau of Land Management, the Bureau of Reclamation, the Tennessee Valley Authority, and State and local flood control agencies or other departments. When floodplains maps cannot be obtained from any of these sources, the owner or operator, with the assistance of a qualified professional firm, can determine flood-flow frequency using Water Resources Council Bulletin Number 17A (1977), Guidelines for Determining Flood-Flow Frequency.

EPA is requesting information on the problems associated with locating facilities in areas subject to frequent flooding (e.g., in five- or ten-year floodplains). The Agency is concerned about locating facilities in such areas because EPA believes that frequent flooding may result in erosion, undermining, and eventual washout of the facility. Engineered systems for preventing such occurrences, therefore, would be subject to frequent maintenance. EPA's existing Subtitle C regulations allow facilities in a 100-year floodplain if precautions to prevent washout have been taken similar to today's proposal. However, the Agency currently is considering revisions to its Subtitle C requirements for locating hazardous waste facilities in floodplains. A ban on MSWLFs in areas subject to frequent flooding could affect large portions of the nation, including the majority of some States, and, thus, could strain the regulated community's ability to provide adequate disposal capacity for municipal solid waste in those areas. Therefore, a total ban on siting in floodplains for Subtitle D is not deemed appropriate. The Agency is requesting comment on locating facilities in areas of frequent flooding.

3. Section 258.12 Wetlands

Today's proposal includes provisions that no new MSWLF units can be placed in wetlands unless the owner or operator makes specific demonstrations to the State that the new unit: (1) Will not result in "significant degradation" of the wetlands as defined in the CWA section 404(b)(1) guidelines, published at 40 CFR Part 230, and (2) will meet other requirements derived from the section 404(b)(1) guidelines. Existing facilities that are located in wetlands could continue to operate.

EPA believes that these stringent restrictions are necessary to protect human health and the environment because of the potential damage caused by siting MSWLFs in wetlands. The background document to the rule describes the threats posed when MSWLFs are located in wetlands (Ref. 2). Moreover, within recent years the Agency has identified wetlands protection as a top priority, specifying aggressive implementation of the Clean Water Act section 404 program, increased coordination with and consistency of Federal and State policies, and other measures as may be necessary. To this end, the Agency considers today's proposed action as essential measure for protecting wetland resources.

Today's proposed action is based on existing Agency wetland policy as expressed in the 40 CFR Part 230 guidelines; Executive Order No. 11990, Protection of Wetlands; and the January 23, 1986, Memorandum of Agreement (MOA) between EPA and the Army Corps of Engineers, which addresses the disposal of solid waste in wetlands under RCRA. The 1986 MOA represents an interim arrangement for controlling solid waste disposal in waters of the U.S., including wetlands. In the long term, the expanded RCRA solid waste regulations proposed herein will help play a key role in protecting wetlands from the unregulated disposal of waste materials.

EPA's Part 230 guidelines are the regulations that specify the analytical tools and environmental criteria to be used when determining whether to issue Clean Water Act section 404 permits for proposed discharges of dredged or fill material in waters of the United States, which include most wetlands. To be consistent with the Act, the provisions proposed today in § 258.12 adopt the definition of wetlands contained in the Army Corps of Engineers (the Corps) section 404 implementing regulations (33 CFR Parts 320 through 330) and the EPA section 404(b)(1) guidelines (40 CFR Part 230). EPA believes that consistency with this definition will aid in implementing the MSWLF provisions. As defined by EPA and the Corps, wetlands are those "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalance of vegetation typically adapted for life in saturated soil conditions. Wetlands include, but are not limited to, swamps, marshes, bogs, and similar areas."

Today's proposed action adopts the four major requirements of the guidelines: (1) The practicable alternatives test, (2) lack of significant degradation; (3) compliance with other applicable laws, and (4) minimization of adverse effects. The guiding precept of the guidelines is that discharges into wetlands should not be allowed unless the owner or operator can demonstrate that such discharges: (1) Are unavoidable, i.e., there are no practicable alternatives to discharging in wetlands; and (2) will not cause or contribute to significant degradation of wetlands. In particular, the guidelines identify filling operations in wetlands as among the most severe environmental impacts covered. For this reason, EPA believes that these guidelines should be used to provide the basis for today's proposal. Moreover, these guidelines are in keeping with Agency policy of maintaining consistency among different EPA programs.

The guidelines in § 230.10(a) state that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge would less adversely impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." An alternative is practicable if it is: (1) Available and (2) feasible, i.e., capable of satisfying the basic or overall purpose of the proposed project, taking cost, logistics, and technology into consideration. For activities that are not water-dependent, i.e., do not require access or proximity to wetlands to fulfill their basic purpose, the guidelines further provide that: (1) Practicable alternatives that do not involve wetlands are presumed to be available, unless clearly demonstrated otherwise; and (2) where a discharge is proposed for a wetland, all practicable alternatives that do not involve a discharge to a wetland are presumed to have a less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise. Both of these rebuttable presumptions place a burden on the permit applicant to demonstrate that no practicable alternatives exist.

In addition to the practicable alternatives test, the guidelines also require that "no discharge of dredged or fill material shall be permitted which would cause or contribute to significant degradation of the waters of the United States," including wetlands (40 CFR 230.10(c)). Under the guidelines, effects contributing to significant degradation considered individually or cumulatively include significant adverse effect on: (1) Human health or welfare; (2) life stages of aquatic life and other wetland-dependent wildlife; (3) aquatic ecosystem diversity, productivity, and stability, e.g., a wetland's capacity to assimilate nutrients, purify water, or reduce wave energy, and (4) recreational, aesthetic, and economic values.

Third, § 230.109(c) of the guidelines states that a discharge of dredged or fill material shall not be permitted if it: (1) Causes or contributes to violations of any State water quality standards; (2) violates applicable toxic effluent standards or other Clean Water Act Section 307 standards; (3) jeopardizes species or habitat protected under the Endangered Species Act; or (4) violates any requirement imposed by the Secretary of Commerce to protect marine sanctuaries under the Marine Protection, Research, and Sanctuaries Act.

Moreover, the guidelines provide that a permit should not be issued unless appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge into wetlands (40 CFR 230.10(d)). Subpart H of the guidelines lists examples of the many types of actions that can be undertaken to minimize the adverse effects of discharges of dredged or fill material.

Because construction of a new landfill essentially is a filling operation, it destroys the wetland, which generally cannot be restored due to the complexities and fragility of the ecosystem. EPA also believes that it is essential to preserve the ecological function of the remaining wetland at an existing facility. Thus, unless the owner or operator can make the demonstration specified in § 258.12(a), new facilities and lateral expansions of existing facilities into wetlands are banned. This demonstration is similar to those established by EPA in the section 404(b)(1) guidelines at 40 CFR 230.10. The importance of these demonstrations is discussed below.

With regard to an owner or operator who wishes to site a new facility or expand an existing facility in wetlands, today's proposal essentially adopts the restrictions on discharges contained in § 230.10 of the guidelines and requires them in the form of prior demonstrations to be made to the State. Failure to make any of the following demonstrations will bar the MSWLF from being sited in a wetlands.

First, the MSWLF owner or operator must consider and evaluate alternative sites outside of wetlands and demonstrate that no environmentally acceptable "practicable alternative" is available. As discussed above, § 230.10(a) of the guidelines provides guidance on the meaning of the term "practicable alternatives." Since a landfill is not a water-dependent activity, the guidelines presume that: (1) Alternatives that do not involve locating MSWLFs in wetlands are available, and (2) such alternatives have a less adverse impact on the aquatic ecosystem. These presumptions make the alternatives analysis a rigorous test for the MSWLF owner or operator to meet.

Second, the MSWLF owner or operator must demonstrate that siting the landfill in the wetland will not cause or contribute to "significant degradation" of the wetlands, as defined in 40 CFR 230.10(b). Third, the owner or operator must ensure that siting in the wetlands does not violate any provisions of the applicable laws specified in § 230.10(c).

Fourth, the MSWLF owner or operator must demonstrate that, if the MSWLF is sited in the wetland after satisfying 40 CFR 230.10 (a), (b), and (c), appropriate and practicable steps have been taken to minimize potential adverse impacts of the MSWLF on the wetlands. These may include careful decisions with respect to the solid waste to be disposed of, any protective technology employed, attention to plant and animal populations, and measures that mitigate unavoidable impacts on wetland values. The guidelines identify a number of possible measures.

Finally, the owner or operator must show that sufficient information is available for making reasonable determinations with respect to these demonstrations; otherwise, the owner or operator cannot make the demonstrations necessary to qualify for the waiver to the ban. This last requirement places the burden for making the required demonstrations squarely on the MSWLF owner or operator.

EPA recognizes the burden that these requirements place on the MSWLF owner or operator who wishes to site a new facility, or expand an existing one, in wetlands. EPA believes, however, that the nation's wetlands are sensitive ecosystems that merit the protection afforded by these requirements. For this reason, the Agency proposes that no new MSWLFs (including internal expansions of existing MSWLFs) should be located in wetlands unless the MSWLFs meet the stringent waiver requirements. Comments are requested on the proposed ban and on the demonstration Criteria for the waiver.

Since the EPA section 404(b)(1) guidelines are prospective in nature, they do not address, or apply to, the question of existing facilities located in wetlands. The issue is whether, and to what extent, the revised Criteria should prohibit or otherwise restrict the operation of existing MSWLFs.

EPA recognizes that requiring existing MSWLFs in wetlands to close would not generally restore the ecological function of the wetland. Further, requiring existing units in wetlands to close would adversely imapct waste disposal capacity. EPA estimates that approximately 6 percent of all MSWLFs are in wetlands. This estimate was developed by correlating maps of wetland areas with MSWLF locations. The Agency welcomes additional data that commenters may wish to supply concerning the number of MSWLFs sited in wetlands.

In developing the wetlands requirements for this proposal, EPA sought to balance the need to protect the fragile ecosystem with the practicable capability of owners and operators of MSWLFs. EPA recognizes that in some parts of the country, large areas fall within the definition of wetland. In these areas, a ban on the maintenance of existing facilities in wetlands could have great detrimental effects on waste management in communities and could possibly encourage inadequate alternatives to be implemented.

For existing facilities, EPA is not proposing to require closure and/or removal of waste. The existing Subtitle C standards do not specifically address wetlands, but the Agency intends to propose revisions to these standards in the future. The Agency believes that closure and/or removal of waste is not viable for MSWLFs located in or adjacent to wetlands because this approach would result in significant impacts on disposal capacity and cause major disruptions in current municipal solid waste management. There would be reduced capacity if MSWLFs located in wetlands were required to close and siting of MSWLFs in those States where large areas are included under the definition of wetlands would be substantially hindered. The Agency believes the approach proposed today for existing MSWLFs in wetlands properly considers disposal capacity concerns and the practicable capability of MSWLF owners and operators.

4. Section 258.13 Fault Areas

EPA proposes to ban the siting of new units of MSWLFs in locations within 60 meters (200 feet) of faults that have had displacement in Holocene time. (The Holocene is a geologic time unit, known as an epoch, that extends from the end of the Pleistocene to the present and includes approximately the last 11,000 years.) This requirement would be consistent with the existing location standard for hazardous waste facilities under Subtitle C; EPA has concluded that it is appropriate to impose the same requirement on MSWLFs because EPA believes that faults also may adversely affect the structural integrity of MSWLFs.

Earthquakes present a threat to public safety and welfare in a significant portion of the United States. Damage and loss of life in earthquakes occur as a result of surface displacement along faults (surface faulting) and ground motion (shaking), as well as secondary effects of the shaking such as ground or soil failure. Today's proposed standard is designed to protect facilities from deformation (i.e., bending and warping of the earth's surface) and displacement (i.e., the relative movement of any two sides of a fault measured in any direction) of the earth's surface that occur when the fault moves. The best protection for MSWLFs is to avoid faults subject to displacement and the zone of deformation.

The Agency is not proposing a standard for existing MSWLFs located over faults. EPA considered requiring existing units located over faults to close over a period of time; however, insufficient information exists that would justify the closure of these units. EPA requests comment on this issue.

The effects of deformation drop off rapidly as distance from the fault increases. Since the greatest degree of deformation occurs along the fault with the greatest displacement (usually the main fault), the farther away the MSWLF is from the main fault, the less likely it will be affected by deformation. Studies of main fault traces (i.e., faults that had most displacement in an area) suggest that most deformation occurs within 60 to 90 meters of faults that have had displacement in Holocene time. Since the 60-meter setback is measured from any fault, not just the main fault trace, EPA believes that a 60-meter distance from any Holocene fault (surface or subsurface) would provide ample protection against the effects of deformation. If a facility is located near a fault, containment structures (liners, leachate collection systems, and final covers) may be inadequate to prevent release of solid waste and hazardous constituents during an earthquake. Outside of this zone, ground motion will be less severe, and containment structures designed to withstand ground motion, as specified in § 258.14 (described below), should be adequate to protect human health and the environment.

Holocene faults are faults that either were created or experienced displacement in Holocene time. The faults are a concern because the geologic evidence indicates that faults that have been moved in recent times, i.e., during Holocene time, are the ones most likely to move in the future. Faults that have had displacement in Holocene time are easier to identify and date in the field than older faults because this epoch produced recognizable geological deposits, and erosion and deposition surfaces. These faults are identifiable by fault scarps, offset streams, mole tracks, furrows, and fault traces on young surfaces with ground-water barriers marked by spring alignments and vegetation contrasts.

EPA's definition of "fault" is intended to include main, branch, or secondary faults. This definition would include both faults that appear at the surface and those that do not have surface expression (including the small fault planes associated with surface faults). Because only faults that have experienced displacement in Holocene time are of concern in this standard, a subsurface or surface fault that has not disturbed the Holocene deposits is not included in the definition.

In some areas of the country, Holocene deposits and landforms are scarce, such as areas where glacial activity has stripped the surficial ground cover and left highly resistant rock, so inspection of Holocene deposits and landforms will not yield enough evidence to conclusively determine whether there has been recent faulting activity. In these situations, reference to seismic epicenter plots and historic records may be needed, and identification and close examination of possible fault-related features expressed in Pleistocene and older deposits may be necessary as well.

In 1978, the U.S. Geological Survey mapped the location of Holocene faults in the United States (Ref. 2). Maps of identified Holocene faults in the United States also are available from the States of California and Nevada. Based on these maps and maps of MSWLFs, EPA estimates that 35 percent of all MSWLFs are in counties that contain faults that have been active in the Holocene, putting a large number of MSWLFs in potentially threatened areas. However, the Agency does not have data showing how close landfills located in these counties are to the active faults.

The current Subtitle C regulations for hazardous waste facilities have the same location restriction being proposed in today's rulemaking. The Agency believes that this standard also is appropriate for MSWLFs because faults also present concerns relating to failure of containment structures for MSWLFs. In addition, the Agency believes that a similar ban is within the practicable capability of new MSWLFs because the area of the nation within 60 meters from a Holocene fault, i.e., the banned area, is limited. EPA requests comment on both the general concept of a location restriction based on fault areas and the specific 60-meter setback requirement.

5. Section 258.14 Seismic Impact Zones

Today's proposal would require the owner or operator of a new MSWLF unit in a seismic impact zone to design the unit to resist the maximum horizontal acceleration in hard rock at the site. Seismic impact zones are defined as areas having a 10 percent or greater probability that the maximum expected horizontal acceleration in hard rock, expressed as a percentage of the earth's gravitational pull (g), will exceed 0.10g in 250 years.

The National Oceanic and Atmospheric Administration and others have documented structural damages resulting from earthquakes. The potential for damage to MSWLFs from earthquakes can be deduced from similar structures damaged by earthquakes. Such damage includes cracks in foundations and complete collapse of structures. EPA believes that the adverse impact of siting MSWLFs in seismic areas justifies the need for a comprehensive standard to prevent releases from these facilities. Types of failure that may result from ground motion are: (1) Failure of structures from ground shaking; (2) failure of unit components due to soil liquefaction, liquefaction-induced settlement and landsliding, and soil slope failure in foundations and embankments; and (3) landsliding and collapse of surrounding structures. The background document supporting this section of the rule (Ref. 2) provides examples of the potential adverse effects on MSWLFs that may occur in seismic impact zones. The Agency believes that these failures may result in contamination of air, ground water, surface water, and soil. Therefore, in order to protect human health and the environment, all containment structures, including any liners, leachate collection systems, and surface water control systems at new MSWLFs, must be designed to withstand the stresses created by peak ground acceleration at the site from the maximum earthquake based on regional studies and site-specific analyses.

The Agency's proposed requirement translates to a 4-percent probability of exceeding the maximum horizontal acceleration in 100 years. The Agency believes that the areas affected by the proposed "seismic impact zone" requirement represent the areas of the United States with the greatest seismic risk, and, therefore, this proposal would be protective of human health and the environment.

The proposed performance requirement would minimize the risk of slope and liner failure due to seismic activity. By minimizing the risk of failure of the landfill slopes, the potential for exposure of solid waste to the atmosphere and the possible contamination of run-off by contacting exposed solid waste also would be reduced. The Agency further believes that today's proposal would reduce the potential for contamination of ground water beneath the landfill resulting from failure of a liner.

Although § 258.13 of today's proposal would prohibit siting new units on or adjacent to active Holocene faults (faults that have had displacement in Holocene time) to protect against releases of wastes from facility failure due to fault rupture, this standard does not address damage that may occur as a result of earthquake-induced ground motion. Studies indicate that ground motion is more important as a failure mechanism than fault rupture, and not all earthquakes are manifested by surface faulting (Ref. 2). Ground motion resulting from earthquakes without associated surface faulting has been found in some cases to be two or three times that associated with quakes with faulting.

Maps depicting the potential seismic activity across the United States at a constant-probability level have been prepared (U.S. Geological Survey Open-File Report 82–1033). The maps indicate that certain portions of the country are at a higher level of seismic hazard than other areas. For example, portions of the eastern U.S., although not subject to frequent earthquakes, are at a higher level of seismic hazard than portions of the western U.S.

The process of designing earthquake-resistant components may be divided into three steps: (1) Determining expected peak ground acceleration at the site from the maximum quake, based on regional studies and site-specific seismic risk analysis; (2) determining site-specific seismic hazards (e.g., soil liquefaction); and (3) designing the facility to withstand peak ground accelerations. Various methods for accomplishing the above steps are available. Methods appropriate to individual MSWLFs should be selected by the owner or operator, subject to State approval.

While the existing Part 257 Criteria and current Subtitle C requirements do not address seismic impact zones, additional location restrictions for hazardous waste disposal facilities under Subtitle C of RCRA are being developed, and a standard consistent with today's proposal is being considered. The Agency believes that this standard is appropriate for MSWLFs because the concerns relating to failure of containment structures are the same for any landfill regardless of waste type. The Agency requests comment on the approach proposed today.

6. Section 258.15 Unstable Areas

EPA is proposing to require owners and operators of new and existing MSWLF units located in unstable areas to demonstrate to the State the structural stability of the unit. This demonstration must show that engineering measures have been incorporated into the design of the unit to mitigate the potential adverse impacts on the structural components of the unit that may result from destabilizing events.

Structural components include liners, leachate collection systems, final covers, and run-on and run-off collection systems. Facilities located in unstable areas may require extensive repairs and/or corrective action following the occurrence of a natural or human-induced destabilizing event. EPA has reviewed documented events that illustrate the problems of locating waste management units in unstable areas (Ref. 2). The impacts resulting from natural or human-induced destabilizing events observed include rapid dispersion of contaminants over a large area, contamination of municipal water supplies, and seepage of contaminants into basements.

EPA is proposing to define an unstable area as a location that is susceptible to natural or human-induced events or forces capable of impairing the integrity of the landfill structural components responsible for preventing releases. These areas could include: (1) Subsidence-prone areas, such as areas subject to the lowering or collapse of the land surface either locally or over broad regional areas; (2) areas susceptible to mass movement where the downslope movement of soil and rock under gravitational influence occurs; (3) weak and unstable soils, such as soils that lose their ability to support foundations as a result of expansion or shrinkage; and (4) Karst terrains, which are areas where solution cavities and caverns develop in limestone or dolomitic materials.

National maps are available that locate Karst terrains and landslide-susceptible areas, but weak and unstable soils and subsidence-prone areas appear to be mapped only individually or at the local level. Thus, identification of existing MSWLFs in these unstable areas, and determination of whether the proposed site of a new MSWLF is in an unstable area, would take place on a case-by-case basis where geographic delineation of these areas is not available on a national scale.

A detailed description and discussion of each of the types of unstable areas identified is contained in a background document (Ref. 2) and a brief summary of each type and the potential threats to MSWLFs follow.

Subsidence-prone areas are those subject to surface subsidence because of natural subsurface conditions, such as Karst formations, or human-made subsurface activities, such as fluid withdrawal or mining. Subsidence at a facility can result in rupture, deformation, or other damage to liners or final covers that may release waste directly into the environment.

Areas susceptible to mass movements include areas with evidence of ongoing slope failure; areas where a small increase in shear stress or a small decrease in shear strength might cause slope failure; areas where geologically similar locations in the same general areas have failed; and areas in the vicinity of pre-existing slope failures. Susceptibility to mass movement is determined from geotechnical and geologic studies.

"Mass movement" covers a variety of slope failures and rapid movement of materials downslope by gravitational influences including landslides, avalanches, flows, creeps, solifluction, block sliding, or a combination of these. Mass movements are caused by imbalances between the forces of gravity (shear stress) acting on the mass of soil or rock composing the slope and the shear strength of the mass. Human activity and natural events can increase the shear stress acting on the mass and/or reduce the mass' shear strength, thereby causing failure. Human-induced causes of mass movement include, but are not limited to, construction operations, seepage from human-made sources of water, and stormwater drainage. Naturally occurring slope failures may be caused by large volumes of water from intense rains or melting snows, vibrations and shock waves generated by earthquakes, frost and freeze/thaw cycles, or intense drying of soils. Mass movements, whether naturally occurring or induced, can carry a facility downslope, rupture a facility in place, or destroy facility control and monitoring systems.

Weak and unstable soils include unconsolidated deposits subject to differential and excessive settlement. This movement under and around a facility can tear liners, rupture dikes, render leachate collection systems inoperable, and possibly alter the ground-water flow.

Karst terrains are areas underlain by limestone and dolomite and often are characterized by extensive solution cavities, sinkholes, and fractures. Sinkhole formation, which may occur in certain types of Karst terrains, can cause rupture of unit liners and covers and can result in collapse of the facility. Karst terrains also promote more rapid movement of leachate from the landfill due to extensive fractures and secondary porosity. Based on map overlays of Karst areas and MSWLF locations, EPA estimates that 4-percent of all existing MSWLFs are in Karst terrain; however, not all Karst terrains would be considered unstable under today's proposal.

Under the proposed requirement, the owner or operator of a new MSWLF must determine, and demonstrate to the State, that the proposed site is not subject to any of these destabilizing events. This demonstration should be maintained in the facility file by the owner or operator as part of the permit application. The following factors should be considered in determining whether an area is unstable: (1) Soil conditions that may result in significant differential settling resulting in damage and failure of dikes, berms, or containment structures (for example, the presence of expansive clays that expand when wet and shrink when dry); (2) geologic or geomorphologic features such as mass-movement-prone areas, Karst terrains, or fissures that may result in sudden or nonsudden ground movement and subsequent failure of dikes, berms, or containment structures; (3) human-induced features or events (both surface and subsurface) such as areas of extensive withdrawal of oil, gas, or water from subsurface formations or construction operations that may result in sudden or nonsudden ground movement and subsequent failure of dikes, berms, or containment structures; and (4) any other features that historically indicate that a natural or human-induced event may impair the engineered structures of the unit and for which protective measures cannot be designed to withstand the event, such as volcanic activity areas.

EPA is proposing to require this case-by-case determination of instability because of the difficulty of clearly delineating unstable areas on a broad scale. EPA believes that case-by-case decisionmaking allows the soundest analysis under the circumstances. Subtitle C currently does not address unstable areas; however, the Subtitle C rules are being reviewed and standards consistent with today's proposal are being considered. EPA believes that today's standard is appropriate for MSWLFs because the concerns relating to failure of containment structures are the same for any landfill regardless of waste type.

Because failure of existing units as a result of destabilizing events in unstable areas poses potential threats to human health and the environment, the Agency is proposing that units that cannot make the structural stability demonstration be closed over time. In EPA's view, continued operation of such units would only increase the possible contaminant loading on the environment in the event of failure. In recognition of the practicable capability of the owner or operator to secure a replacement site, EPA is proposing that existing units in unstable areas close within five years of the effective date of the rule. Upon closure, the owner or operator of these facilities would not be required to remove the waste from the unit because removal of the wastes involves certain risks, and EPA believes removal of the wastes would be a great burden and expense to owners and operators and would exceed the practicable capability of the regulated community.

EPA has selected five years as a phase-out period based upon the belief that five years is adequate time for proper facility closure and for siting and construction of a new facility in an acceptable location. The activities that EPA expects to occur during this period include hydrogeologic investigations and site selection, land acquisition, and design, permitting, and construction of the new facility. The Agency is unable to estimate the number of facilities that would be affected by this requirement. EPA requests comments on the concept of a phase-out period, the appropriate length of the phase-out period, and the number of facilities affected.

EPA recognizes that, in some cases, it may not be possible to find a suitable site and construct a replacement MSWLF within five years. To address this situation, EPA also is proposing a variance to the required phase-out that would allow the State to extend (but not waive) the five-year period if no "practicable alternative" is available and if the existing MSWLF unit will not pose a substantial risk to human health and the environment. The Agency believes this variance is appropriate and justifiable under section 4010 of RCRA, which allows EPA to consider the "practicable capability" of facilities to comply with the Criteria. The variance would allow for State flexibility to determine the length of the time extension and to require any interim controls necessary to protect human health and the environment. During the extension period, the owner or operator would be responsible for meeting all other applicable requirements in today's proposal.

In deciding whether to grant a variance, EPA would expect the State to consider whether (1) it currently is not economically feasible to find, develop, and operate a new site; (2) it currently is not logistically feasible to locate a new MSWLF in a more suitable area (e.g., the only suitable property is already developed or is located too far from collection centers); or (3) legal barriers exist to the siting, acquisition, or operation of the landfill in suitable areas (e.g., jurisdictional restrictions do not allow wastes from one municipality to be disposed of in the jurisdiction of another). If such conditions exist, and the risks associated with continued operation during the extended period of time do not pose undue threats to human health and the environment, a variance may be appropriate. A specific risk level is not being proposed because the Agency believes that such a decision is best left to the States, who must weigh the various alternatives.

The Agency recognizes that States may interpret the above criteria in various ways, and that decisions may be based on site-specific conditions. The Agency believes that this is appropriate, since the States are in a better position than EPA to determine whether a specific facility should be granted an extension.

Although it may be difficult to site a new MSWLF within the proposed five-year period, EPA does not intend that States grant unlimited time extensions to units located in unstable areas. Various alternatives, such as regionalization of disposal facilities, recycling and source reduction, municipal waste combustion (i.e., incineration), and the use of transfer stations, are available to manage wastes. These alternatives can be used to overcome environmental, logistical, legal, or economic barriers to siting new landfills.

EPA requests comments on whether other location restrictions such as these or others in addition to those proposed today should be imposed for MSWLFs.

C. Subpart C—Operating Criteria

The requirements of this Subpart would apply to all new and existing MSWLFs. These requirements address day-to-day activities, such as application of daily cover (necessary to reduce immediate threats to public health), and long-term activities, such as post-closure care (necessary to minimize or eliminate the possibility of the release of comtaminants to the environment).

1. Section 258.20 Procedures for Excluding the Receipt of Hazardous Waste

Section 258.20 of today's proposal would require the owner or operator of an MSWLF to implement a program to detect and prevent attempts to dispose of hazardous wastes (regulated under Subtitle C of RCRA) and PCB wastes at the facility (regulated under the Toxic Substances Control Act). EPA does not intend for this regulation to limit the legal disposal in MSWLFs of very small quantity generator (VSQG) hazardous waste (hazardous waste generated at a rate of less than 100 kg per month), certain wastes containing PCBs at concentrations less than 50 ppm, and empty pesticide containers that have been properly rinsed in accordance with the label instructions as specified under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and regulations in 40 CFR Part 165. Today's proposal also does not restrict the disposal in MSWLFs of HHW, which is exempt from EPA's hazardous waste rules; however, the Agency strongly endorses HHW collection programs and recommends the management of collected HHW in hazardous waste management facilities.

With regard to the disposal of PCBs, regulations promulgated under the Toxic Substance Control Act (TSCA) specify MSWLF disposal as proper for limited categories of PCB materials. Such materials include drained PCB-contaminated electrical equipment (i.e., equipment that formerly contained 50 to 500 ppm of PCBs in dielectric fluids), drained hydraulic and heat transfer equipment, and "PCB articles" (see 40 CFR 761.3 and 761.60(b)(5)) that previously contained 50 to 500 ppm of PCBs and that have been drained of free-flowing liquids. Most significantly, TSCA disposal regulations generally allow the disposal in MSWLFs of "small capacitors" that contain less than three pounds of PCB dielectric. These small capacitors frequently are found in fluorescent light ballasts, high-intensity discharge lighting power supplies, and a variety of consumer appliances, such as microwave ovens and air conditioners.

Measures that MSWLF owners and operators must incorporate in their programs to exclude receipt of hazardous waste include, at a minimum, random inspections of incoming loads, inspection of suspicious loads, recordkeeping of inspection results, training of personnel to recognize hazardous waste, and procedures for notifying the proper State authorities if a regulated hazardous waste is found at the facility. The State may require additional program elements.

The random load checking program is a crucial deterrent to illegal disposal. Such a program might include designation of an inspector to examine several random loads throughout facility operations. The loads could be discharged at a designated location separate from landfilling operations, broken down with hand tools, and visually inspected for indications that suspicious containers may hold Subtitle C hazardous wastes. The rule could require that records be kept of each load inspection. The records should include the date, time, name of the hauling firm, driver, source of the waste, vehicle identification numbers, and all observations made by the inspector.

Each MSWLF would be required to train all necessary personnel to identify potential sources of Subtitle C hazardous wastes. At a minimum, this should include supervisors, spotters, designated inspectors, equipment operators, and weigh station attendants. The training should emphasize familiarity with containers and labels typically used for hazardous wastes and other hazardous materials. If Subtitle C hazardous waste is found in any load inspected, or otherwise found at the facility, the owner or operator should promptly notify the State. The owner or operator should cordon off the area where the material was deposited and make efforts to carry out proper cleanup, transport, and disposal of the material at a permitted hazardous waste management facility.

In developing this proposal, EPA considered specifying the program in detail, delineating all activities and procedures needed to exclude hazardous waste. The Agency decided against a strictly defined program because each landfill will receive different amounts of waste that could contain questionable material. Today's proposal gives States and MSWLF owners and operators flexibility in implementing this requirement.

2. Section 258.21 Cover Material Requirements

EPA proposes to strengthen the cover material criterion imposed under § 257.3–6 of the existing Subtitle D Criteria to require the application of suitable cover material at the end of each operating day, or at more frequent intervals, if necessary, to control disease vectors, fires, odors, blowing litter, and scavenging. MSWLFs receive wastes that consist of a wide variety of materials. In particular, such facilities receive wastes that contain putrescible materials. As discussed in the background document for this section of the proposal (Ref. 3), the disposal of such materials in MSWLFs results in conditions conducive to the harborage of rodents and other disease vectors. EPA is proposing this requirement because problems associated with putrescible waste at MSWLFs are alleviated in part by cover material. In addition, 45 States and Territories require daily cover, suggesting that this is an effective procedure and that, by not requiring daily cover, the current Criteria are not sufficient.

Cover material serves several specific purposes for protecting human health and the environment: (1) It helps in disease vector and rodent control; (2) it helps contain odor, litter, and air emissions, which may threaten human health and environment and/or be aesthetically displeasing; (3) it lessens the risk and spread of fires; and (4) it reduces infiltration of rainwater by increasing run-off and thereby decreases leachate generation and surface and ground-water contamination. As an additional benefit, cover enhances the site appearance and utilization after completion.

EPA has not specified the type or amount of cover material to be used, leaving the determination of "suitable material" and minimum depth up to the State; however, EPA recommends that a six-inch depth of compacted earthen material be used as cover material. Tests have shown that 6 inches of compacted sandy loam prevent fly emergence; daily (or more frequent) cover has been shown to reduce the attraction of birds and to discourage rodents from burrowing into the waste. In addition, 45 States and Territories already specifically require 6 inches of daily cover and it is considered an accepted practice at most MSWLFs. This and other aspects of cover material are discussed in the background document for this section (Ref. 3).

Today's proposal allows the States to temporarily waive the daily cover requirement on a case-by-case basis in the event of extreme seasonal climate conditions, such as heavy snow or severe freezing, that make meeting the requirement impractical. This provision would allow the State to consider the practicable capability of the regulated community. EPA requests comments on the appropriateness of the frequency and depth of cover application and on whether there are other reasons for exempting daily cover. EPA also is requesting comments on the acceptability of cover materials other than earthen materials (e.g., foams).

3. Section 258.22 Disease Vector Control

Today's proposal would require that each owner or operator of an MSWLF prevent or control on-site disease vector populations using appropriate techniques to protect human health and the environment. This requirement is consistent with existing § 257.3–6, which states that "[t]he facility or practice shall not exist or occur unless the on-site population of disease vectors is minimized through the periodic application of cover material or other techniques as appropriate so as to protect public health."

Municipal wastes are known to contain pathogenic bacteria, parasites, and viruses that can infect humans and animals. These wastes also provide food and harborage from rodents, flies, and mosquitoes that then transmit disease organisms to humans and animals.

The performance criterion set forth in this section would provide States and MSWLF owners and operators flexibility in meeting this requirement to accommodate site-specific differences in vectors and in appropriate control technologies and mechanisms. Today's proposed standard to control disease vectors is intended to prevent the facility from being a breeding ground, habitat, or a feeding area for disease vector populations. The requirements for vector control are to be undertaken in conjunction with the cover material requirements in § 258.21. Cover material applied at the end of each operating day reduces the availability of food and harborage for rodents and other vectors and thus may be adequate in most cases to meet the performance criterion for disease vector control; however, if cover material requirements prove insufficient to ensure vector control, this criterion would require that other steps be taken by the owner or operator to ensure such control. The background document for this section discusses various methods for minimizing disease vectors (Ref. 3).

4. Section 258.23 Explosive Gases Control

The decomposition of solid waste (in particular, household waste) produces methane, an explosive gas. The accumulation of methane gas in MSWLF structures or nearby off-site structures can result in fire and explosions, potentially injuring or killing employees, users of the disposal site, and occupants of nearby structures, in addition to damaging containment structures resulting in the emission of toxic fumes. Several incidents resulting in deaths are discussed in the background document (Ref. 3).

For this reason, EPA established an explosive gas criterion in § 257.3–8 of the original Subtitle D Criteria to regulate the concentration of methane in facility structures and at the property boundary. This requirement is expanded in today's proposal. The lower explosive limit (LEL) of a gas is the lowest percent, by volume, of that gas in a mixture of explosive gases that will propagate a flame in air at 25°C and atmospheric pressure at sea level. Today's proposal would require that the concentration of methane generated by the MSWLFs not exceed 25 percent of the LEL in facility structures (excluding gas control or recovery system components) and the LEL itself at the property boundary. EPA based its selection of the 25 percent figure for the Criteria on a safety factor recognized by other Federal agencies as being appropriate for similar situations (Ref. 3); however, the Agency concluded that a 25 percent criterion was unnecessary at the property boundary because gases at or below the LEL at the property boundary will become somewhat diffused before passing into a structure beyond the property boundary. For these reasons, EPA continues to believe that the LEL standard would provide an adequate safety margin against off-site explosions. The Agency believes that these limits are protective of human health and the environment while not being unduly restrictive.

Further, the proposal includes routine subsurface and facility structure gas monitoring requirements and a requirement that, if methane exceeds the limits specified, the owner or operator must take necessary steps to ensure protection of human health and immediately notify the State of the level detected and the steps taken to protect human health. Such steps could include evacuation and ventilation of affected buildings. In addition, the Agency is proposing that the owner or operator submit a remediation plan to the State within 14 days of limits having been exceeded. This remediation plan must describe the nature and extent of the problem and the proposed remedy. Examples of appropriate remedies include installation of interceptor gas collection trenches, venting in structures, and subsurface gas withdrawal. The owner or operator would be required to implement the plan after State approval.

In reviewing damage cases that have occurred as a result of methane migration from landfills, the Agency has noted that many of these incidents have occurred since promulgation in 1979 of the existing Criteria, which do not require routine gas monitoring. The Agency believes many of these instances could have been prevented if routine monitoring had been conducted to detect the dangerous levels prior to the incident. This issue is further discussed in the background document (Ref. 3). Early warning would allow the owner or operator to take action to prevent catastrophic events.

Because methane has been the principal source of explosions associated with solid waste disposal, EPA proposes to require monitoring only for methane at this time. EPA may require monitoring for other gases if new information develops at a later time indicating that there are other gases that pose problems; however, EPA currently does not have sufficient information on other gases generated to justify requiring owners and operators to monitor for them.

EPA is proposing that methane monitoring be conducted at least quarterly. As mentioned earlier, monitoring would provide early warning of potential methane build-up that may lead to explosions. The Agency believes that quarterly monitoring is a reasonable minimum frequency that accounts for the seasonal variations in subsurface gas migration patterns. The Agency recognizes that site-specific conditions may require more frequent monitoring, e.g., when facilities are near residential areas or enclosed in structures, and encourages States to require additional monitoring as necessary. There also may be limited situations (e.g., in very remote areas) where less frequent monitoring may be sufficient. EPA requests comment on these situations and the appropriateness of the minimum monitoring frequency specified in today's proposal.

Monitoring is intended to ensure that the performance standard is being met at the MSWLF. EPA considered specifying the type of monitoring and monitoring devices, but such an approach would not allow the consideration of site-specific factors in establishing the appropriate monitoring system. The proposal would allow State flexibility in determining the appropriate monitoring requirements on a case-by-case basis.

Site-specific factors to be considered when determining the type and frequency of monitoring are discussed in an Agency guidance manual (Ref. 12). Factors to be considered in determining the type and frequency of monitoring include: soil conditions, hydrogeologic conditions surrounding the disposal site, hydraulic conditions surrounding the disposal site, and the location of facility structures and relative to property boundaries. These factors control the rate and extent of gas migration and are discussed further in the guidance manual (Ref. 12).

Monitoring in a facility structure normally should be performed after the building has been closed overnight or for a weekend because these are the times when the most dangerous conditions are likely to exist. Sampling should be done in confined areas where gas may accumulate, such as in basements, crawl spaces, attics near floor cracks, and ground subsurface utility connections. Gas recovery and gas control equipment, however, need not be sampled. If all the readings are less than 25 percent LEL, the MSWLF would be in compliance; however, the presence of any methane in a facility structure, even in concentrations below 25 percent LEL, should be considered a problem that deserves attention and steps should be taken to ensure that the level of methane does not reach explosive levels. EPA recommends that continuous monitoring devices be used in facility structures at the landfill site.

For monitoring along property boundaries, at least two monitoring points should be located along the property boundaries closest to residences or other potentially affected structures. The exact location of these points should take into account any gas-permeable seams. In selecting the sampling points, some of the factors to consider include dry sand or gravel pockets, alignment with an off-site point of concern, proximity of the waste deposit, areas where there is dead or unhealthy vegetation that might be due to gas migration, and areas where underground construction may have created a natural path for gas flow (e.g., utility lines).

Monitoring should be conducted at the property boundaries ideally when the soil surface has been wet or frozen for several days because this is when levels are expected to be greatest (Ref. 12). The results, location, date, and time of monitoring should be recorded. If any of the readings are equal to or greater than the LEL, the facility would not be in compliance. It may be necessary to repeat the tests at a later date or under different climatic conditions to verify the readings. Where active control systems are being used, samples should be taken when all pumps have been shut down for their maximum time during normal operation.

Monitoring at the property boundary could be accomplished by using a permanent well or a portable monitoring device. The device should be determined by the State on a case-by-case basis. EPA has provided additional guidance on types of monitoring devices that could be used (Ref. 12). The Agency suggests that methane at a concentration just below the LEL at a monitoring point may indicate a major problem and should not be ignored. The appropriate action would depend on the proximity of off-site structures, possible pathways, and other factors. In all cases, an evaluation should be made so that the danger of explosion is minimized.

5. Section 258.24 Air Criteria

The existing Criteria in Part 257 prohibit the open burning of solid waste but allow infrequent burning of agricultural wastes, silvicultural wastes, land clearing debris, diseased trees, debris from emergency cleanup operations, and ordnance. Today's proposal under § 258.24 maintains this standard. Requirements for compliance with State Implementation Plans (SIPs) under section 110 of the Clean Air Act (CAA) would remain unchanged from the Part 257 Criteria.

The Agency believes that any infrequent burning of the waste types listed above should be conducted in areas dedicated for that purpose and at a distance away from the landfill unit so as to preclude the accidental burning of other solid waste. For the purposes of this proposal, agricultural waste does not include empty pesticide containers or waste pesticides.

Open burning, which is the uncontrolled or unconfined combustion of solid wastes, is a potential health hazard, damages property, and can be a threat to public safety. For example, smoke from open burning can reduce aircraft and automobile visibility and has been linked to automobile accidents and death on expressways. The air emissions associated with open burning are much higher than those associated with incinerators equipped with air pollution control devices. Combustion in a trench or pit incinerator is considered the equivalent of open burning because particulate emissions from trench and pit incinerators equal or exceed those from open burning.

As stated earlier, EPA originally established the ban on open burning in the 1979 Criteria. Commenters on the proposal to the 1979 Criteria questioned the necessity for that ban, stating that open burning reduces the volume of solid waste and helps control disease vectors. The Agency recognized that some volume reduction is achieved, but no data were provided that disease vectors were significantly reduced. EPA established the ban on open burning of these wastes because the hazards posed to human health (e.g., increase in particulate emissions, decreased safety) outweighed any benefits derived from the practice. Since the promulgation of the current Part 257 Criteria, the Agency has not received any new data that would contradict this conclusion. Therefore, EPA is retaining the open burning prohibition in today's proposal.

The Agency is aware that some States allow certain communities to open burn routinely municipal solid waste under certain circumstances. Such communities usually generate small amounts of waste and are in remote areas. The major advantage claimed is substantial volume reduction in the waste to be disposed of, thus extending landfill life. These communities assert that disposal costs would increase dramatically if there were strict enforcement of the Federal ban on open burning; however, these communities have not addressed the impacts on human health and the environment resulting from the practice on open burning, and, because health and environmental concerns are the underlying reason for the ban, the Agency does not intend to change the requirement from the 1979 Criteria. However, because EPA has received these comments stating that open burning is a necessary disposal practice, the Agency is specifically requesting comment on this issue.

This proposal retains the requirement that new and existing MSWLFs not violate applicable requirements developed under a SIP approved or promulgated by the Administrator under the CAA Section 110, as amended. EPA originally instituted this requirement because regional health concerns addressed through the SIPs clearly are of concern under RCRA as well as the CAA. Obviously, RCRA regulations should not undermine the provisions that implement the CAA.

Recent studies conducted by the Agency indicate that MSWLFs also appear to be a source of air pollutants. Gases of decomposition originate within the landfill and vent to the atmosphere by vertical migration and/or lateral migration. Landfill gas is generated by chemical reactions and by microbial degradation of refuse materials into a variety of simpler compounds. Typically, landfill gas consists of approximately 50 percent methane, 50 percent carbon dioxide, and trace constitutents of volatile organic compounds (VOCs) and other toxic constituents. Pollutants commonly found in MSWLF gas include vinyl chloride, benzene, trichloroethylene, and methylene chloride. It is estimated that approximately 200,000 metric tons of nonmethane organics per year are emitted nationwide from existing MSWLFs. Some of these compounds can create an odor nuisance while the VOCs and other toxic emissions can constitute a health hazard. This is in addition to the dangers from the explosion potential of methane (as described above).

Air emissions from MSWLFs can be controlled by collecting and controlling (or recovering) the extracted landfill gas. At approximately 100 landfills, gas is collected and used as recovered energy. Control systems can be economically attractive due to the energy recovery benefits, especially at larger landfills. There are sites controlling or recovering landfill gas in many States, including California, Maryland, New Jersey, New York, Ohio, Oregon, Texas, Wisconsin, and Washington.

EPA has decided to regulate MSWLF air emissions under the CAA Section 111(b) for new landfills and Section 111(d) for existing landfills. Under Section 111(d), EPA is preparing air emission guidelines that are to be adopted by States; they will prepare plans for controlling existing sources of MSWLF air emissions according to the EPA guidelines. The regulations will be based on both collecting and controlling landfill gas. EPA plans to propose air emission standards for MSWLFs in the near future.

6. Section 258.25 Access Requirements

EPA is proposing to require control of public access at new and existing MSWLFs to prevent illegal dumping of wastes and public exposure to hazards at MSWLFs as well as to prevent unauthorized vehicular traffic. Access control is a key element in preventing injury or death at these facilities. Because EPA also is concerned with the unauthorized dumping of hazardous waste, the proposed requirement expands on the existing 257.3–8 health and safety criteria, which prohibit uncontrolled public access, by adding requirements to control illegal dumping of wastes and unauthorized vehicular traffic.

EPA proposes that MSWLF owners or operators control public access, illegal dumping, and unauthorized vehicular traffic using natural and/or artificial barriers, as appropriate, to protect human health and the environment. Steps needed to comply with this standard would be determined by the State on a site-specific basis. At some facilities, it may not be necessary to construct any artificial barriers, such as fences, in order to comply with this criterion. Such facilities include, for example, those located in remote areas away from the general public or in areas with mountainous terrain or cliffs that would make access by the general public difficult. Posting signs and gates across access roads may be sufficient in remote areas to prevent public access that could lead to injuries; however, facilities that are located near residential areas or other public areas may be required to construct fences in order to control access. Unauthorized vehicular traffic and illegal dumping could be prevented by placing gates with locks at all entrances to a remote site. Other provisions may be necessary on a site-by-site basis.

Under the Subtitle C regulations, the owner or operator must prevent unknowing entry, and minimize the possibility for unauthorized entry, onto the active portions of the facility. At a minimum, a hazardous waste facility must have a 24-hour surveillance system or an artificial or natural barrier, such as a fence in good repair or a fence in combination with a cliff that completely surrounds the active portion of the facility, and a means to control entry at all times. The requirements may be waived under Subtitle C if it can be demonstrated that physical contact with the waste or equipment will not injure unauthorized persons or livestock and disturbance of the waste or equipment will not threaten human health and the environment.

These Subtitle C requirements are considered unnecessary for MSWLFs because EPA believes the risks associated with direct contact with municipal solid wastes are less than those associated with hazardous waste. Today's proposal allows greater consideration of site-specific conditions in establishing the appropriate controls than the Subtitle C regulations do. For example, as discussed above, the remoteness of a site may serve as an adequate "natural barrier" to facility access. EPA believes that simply requiring owners or operators to control public access allows the owner or operator to implement a system tailored to site-specific characteristics.

7. Section 258.26 Run-on/Run-off Control Systems

EPA is proposing run-on and run-off control requirements. These requirements are interrelated in that diversion of run-on reduces the amount of run-off that needs to be collected. The proposal would require that the owner or operator of an MSWLF design, construct, and maintain a run-on control system to prevent flow onto the active portion of the MSWLF during the peak discharge of a 25-year storm. The purpose of the run-on standard is to minimize the amount of surface water entering the landfill facility. Run-on controls prevent: (1) Erosion, which may damage the physical structure of the landfill (2) the surface discharge of wastes in solution or suspension, and (3) the downward percolation of run-on through wastes, creating leachate. Control is accomplished by constructing diversion structures to prevent surface water run-on from entering the active portion of the facility. Diversion structures help prevent liquids, which will eventually generate leachate or leave the site as contaminated run-off, from coming into contact with the waste.

The Agency believes that the main area of concern, with respect to run-on, is the active portion of the landfill, not the landfill facility as a whole. In this proposal, that part of the facility or unit that has received or is receiving wastes and has not been closed as required in § 258.30 is defined as the active portion. It is at active portions that run-on is most likely to: (1) Seep into the exposed waste, contributing to the formation of leachate, or (2) erode wastes, or constituents of them, and carry them away in surface water run-off. Seepage and erosion would not be a problem at inactive portions that have been closed in accordance with the closure Criteria specified in § 258.30. The Agency proposes that surface water run-on be diverted from active portions. Diversion of run-on may be accomplished by locating the active portion in areas where the topography naturally prevents run-on, by sloping or contouring the land, or by constructing ditches, culverts, or dikes. The capacity of diversion structures should be determined by the owner or operator considering site topography, size of the drainage area, and size of the active portions. The Agency chose the 25-year storm as the design parameter to be consistent with the standard in 40 CFR Part 264, which requires active portions of hazardous waste landfills to be protected from the peak discharge of a 25-year storm.

The quantity of run-off from active portions of landfills can be minimized by (1) minimizing run-on, (2) preventing disposal of liquid wastes in the landfill, and (3) minimizing the size of the active portion of the landfill. To address run-off that is generated, the Agency proposes to require that the owner or operator of an MSWLF design, construct, and maintain a run-off control system from the active portion of the landfill to collect and control at least the water volume resulting from a 24-hour, 25-year storm. Run-off from the active portion of the unit must be handled in accordance with § 258.27 of this proposal in order to ensure that the CWA NPDES requirements and CWA Section 208 and 319 requirements are not violated. Again, the Agency chose the 24-hour, 25-year storm design parameter to be consistent with the standards for Subtitle C facilities in 40 CFR Part 264.

By design, almost all trench and area fills in depressions or pits control most run-off because of surface contours. Owners and operators having area fills that do not use depressions can control run-off by building a berm or dike on the low elevation side; however, when landfills using either the trench or area methods become large or substantially above grade, both run-off and leachate seeps, which often occur on the outer slopes of the fill, need to be collected. Run-off that does emerg from active portions may be collected by ditches, berms, dikes, or culverts, which direct it (sometimes by sump pump) to surface impoundments, basins, tanks, or treatment facilities. These collection devices may consist of temporary structures around active portions. because run-off usually has been in contact with waste or leachete seeps from active portions and sometimes is collected via a leachate collection system, it probably will be contaminated. It is difficult to differentiate between rainwater run-off and leachate run-off at the active portion of a landfill unless an elaborate or expensive sampling program is conducted. Once collected, a number of options exist for treating and disposing of run-off. These include land treatment, treatment in surface impoundments (e.g., evaporation), or discharge to a sewer, other treatment facility, or surface waters (if permitted). The background document supporting this section of the rule (Ref. 3) discusses in further detail 25-year storm events and run-on and run-off control requirements.

8. Section 258.27 Surface Water Requirements

Today's proposal would prohibit any MSWLF unit from (1) causing a discharge of pollutants into waters of the U.S., including wetlands, that violates any requirements of the CWA, including, but not limited to, NPDES requirements; and (2) causing a nonpoint source of polution to the waters of the U.S., including wetlands, that violates any requirements of a State-wide or area-wide water quality management plan under Section 208 or Section 319 of the CWA. The surface water criterion currently in Part 257 was retained in today's proposal because EPA believes it provides necessary protection for human health and the environment.

EPA considers it essential that solid waste activities not adversely affect the quality of the nation's surface waters. Rivers, lakes, and streams are important sources of drinking water, recreational resources, and habitat for a wide variety of fish with other aquatic organisms. Solid waste disposal has led to surface water contamination from run-off of leachate, accidential spills, and drift of spray occurring at landfills. In the proposed Criteria, EPA seeks to coordinate its surface water requirements under RCRA, including programs developed under the CWA to restore and maintain the integrity of the waters of the United States.

Under Section 1006 of RCRA, EPA is required to integrate, to the maximum extent practicable, the provisions of RCRA with other statutes, including the CWA Under the CWA, EPA conducts programs designed "to restore and maintain the chemical, physical, and biological integrity of the nation's water." EPA believes that this goal also is a legitimate objective for its regulatory activity under RCRA and that the Agency should use its authority under RCRA to see that CWA goals are achieved. Thus, in establishing the surface water criteria, EPA employed concepts and approaches use under the CWA. The discharge of a nonpoint source of pollution from solid waste disposal activities would be required to conform with any established water quality management plan developed under Section 208 or Section 319 of the CWA. Not all portions of a Section 208 or Section 319 plan are applicable to solid waste disposal activities, and the State would determine which requirements under these plans apply. Similarly, the discharge of pollutants from solid waste disposal activities would be required to comply with other provisions of the CWA, including the NPDES requirements under Section 402.

The provision of § 257.3–3 of the current Criteria, which states that "a facility shall not cause a discharge of dredged material or fill material to waters of the United States that is in violation of the requirements under Section 404 of CWA, as amended," has been included under the wetlands section of today's proposed Part 258 Criteria.

9. Section 258.28 Liquids Restrictions

EPA is proposing a new requirement for liquids restrictions because the intentional introduction of liquids into landfills can be a significant source of leachate generation. Today's proposal would prohibit bulk or noncontainerized liquid waste that are not household waste (other than septic waste) from being disposed of in MSWLFs. Leachate and gas condensate that is derived from the MSWLF unit and recirculated would be exempt from this prohibition if the unit has been equipped with a composite liner and a leachate collection system designed and constructed to maintain less than 30cm of leachate over the liner in order to ensure that the recirculated liquids are managed properly. Containers of liquid waste could be placed in MSWLFs only when the containers: (1) Are small containers of the size typically found in household waste, (2) are designed to hold liquids for use other than storage, such as a battery or capacitor, or (3) hold household waste.

By restricting the introduction of liquids into landfills through a ban on the disposal of bulk and containerized liquid waste, EPA expects to minimize the leachate generation potential of the landfills, and thus minimize the risk of gound-water contamination. Twenty-one States and Territories already prohibit disposal of liquids and semiliquid wastes in MSWLFs. EPA believes, therefore, that this restriction is a sound MSWLF management practice.

The problems associated with the landfill disposal of containerized liquid wastes arise upon the eventual deterioration of the waste container. Liquids escaping from leaking containers will migrate to the bottom of the landfill, acting as a transport and leaching medium for the wastes contained in the landfill. Liquids accumulating on landfill liners can contribute to liner failure through increased hydraulic pressure and/or chemical interactions. Increased hydraulic head due to liquid accumulation can increase the amount and rate of contaminant movement from the landfill to the ground water. Additionally, when waste containers degrade, allowing their contents to escape, they collapse under the pressure of the landfill. This situation can create voids in the landfill, which can lead to slumping and subsidence of the final cover. Once the integrity of the landfill cover is lost, infiltration of precipitation will increase, contributing to the leachate generation in the landfill. Collapse of deteriorated waste containers and subsequent damage to the cover material could occur after the post-closure care period of the landfill, when ground-water monitoring systems are not maintained to detect ground-water contamination.

Disposal of bulk or noncontainerized liquids in landfills present the same problems that disposal of containerized liquids present once they have leaked from this containers, namely, increased mobility of wastes in the landfill, increased risk of loss of liner integrity through greater pressure and/or chemical interactions, and increased hydraulic head, which can increase the rate and quantity of movement of contaminants to the ground water.

EPA believes that the proposed ban on the disposal of bulk or noncontainerized liquids (except nonseptic waste from households and recirculated leachate and gas condensate at facilities with specific designs) will greatly reduce the quantity of free liquids to be managed in MSWLFs, which, in turn, will reduce the risk of liner failure and subsequent contamination of the ground water. The ban on containerized free liquids (except those from households) will achieve the same purposes as the ban on bulk liquids, and, in addition, will reduce the problem of subsidence and possible damage to the final cover upon eventual deterioration of the waste containers.

EPA recognizes that landfills are, in effect, biological systems that require moisture for decomposition to occur and that this moisture promotes decomposition of the wastes and stabilization of the landfill. Therefore, adding liquids may promote stabilization of the unit. Some concern has been expressed that the Agency requirements would effectively place landfills in a state of "suspended animation," impeding stabilization by minimizing introduction of liquids. EPA does not agree with this argument for several reasons. Wastes received at landfills already contain moisture (10 percent to 35 percent by volume). The Agency believes that this moisture is sufficient for decomposition to proceed. In addition, moisture is added from rainfall, and more moisture is generated during the decomposition process. Finally, although the Agency recognizes that moisture is necessary for waste decomposition, it does not have data that indicate that allowing the deliberate introduction of liquids into a unit for stabilization purposes is beneficial and outweighs the potential problems incurred from increased volumes of leachate.

The intent of today's proposal is to prohibit the disposal of bulk or noncontainerized liquid waste at new and existing MSWLFs units. Household waste (other than septic waste) is exempted because it is beyond the practicable capability of owners and operators to effectively restrict the disposal of all household liquid waste. Furthermore, the primary purpose of today's liquids restrictions is to limit the disposal of large-volume liquids in the landfill. Septic wastes would not be exempted because they are easily identifiable and restricted if they do not pass the liquids test described below.

Certain small containers (e.g., paint cans) and other wastes (e.g., batteries) would be exempt from the containerized liquids ban because they are not likely to contribute substantial amounts of liquids at most landfills and the difficulty of opening and emptying them appears to outweigh the small benefit gained (Ref. 3). EPA believes that the 18-month period between the promulgation date and the effective date of the rule would allow liquid waste disposers adequate time to develop alternatives to liquids disposal in MSWLFs.

Under this proposal, the owner or operator would be required to determine if wastes (e.g., septic wastes, municipal wastewater sludge) are liquid waste by using the Paint Filter Liquids Test method. This test method (Method 9095) already has been adopted by the Subtitle C hazardous waste program (Ref. 34). As discussed earlier under the explanation for the proposed definition for "liquid waste," the Agency requests comments on the appropriateness of the solids content measure as an alternative to the Paint Filter Liquids Test for POTW sludges for defining liquid waste.

The Agency is proposing to allow leachate and gas condensate recirculation at MSWLF units that incorporate a composite liner and leachate collection system into their design. Studies have indicated that leachate recirculation has certain benefits, which include increasing the rate of waste stabilization, improving leachate quality, and increasing the quantity and quality of methane gas production. Leachate recirculation also provides a viable on-site leachate management method. Other methods for managing leachate include disposal in off-site POTWs or on-site treatment facilities. These other methods, however, may not be available or practical because of limited POTW capacity, institutional constraints, or costs. Recent studies conducted by EPA indicate that of those facilities collecting leachate (481 MSWLFs or 5 percent of total), 42 percent (205 MSWLFs) are recirculating leachate. The Agency expects that the number of MSWLFs collecting leachate would increase with the implementation of today's proposed design Criteria (Subpart D of today's proposal).

The Agency recognizes that there are potential operational problems associated with leachate and gas condensate recirculation that may result in adverse impacts on human health and the environment. These problems include: (1) An increase in leachate production, (2) clogging of the leachate collection system (LCS), (3) buildup of hydraulic head within the unit, (4) an increase in air emissions and odor problems, and (5) an increase in the potential of leachate pollutant releases due to drift and/or run-off. Therefore, EPA is proposing that only MSWLF units designed and equipped with composite liners and an LCS constructed to maintain less than a 30-cm depth of leachate over the liner be allowed to recirculate leachate and gas condensate.

A composite liner is a system consisting of two components. The upper component must contain a flexible membrane liner (FML), and the lower component must contain at least a three-foot layer of compacted soil with hydraulic conductivity of no more than 1×10^{-7} centimeters per second. The FML component must be installed in direct and uniform contact with the compacted soil component so as to minimize the migration of leachate through the FML if a break should occur. Because of the increased leachate generation due to the increased amounts of liquids and subsequent hydraulic head buildup, EPA believes that the added protection provided by a composite liner is necessary to ensure that contaminant migration to the aquifer is controlled. First, the FML portion of the liner will increase leachate collection efficiency and provide a more effective hydraulic barrier. Second, the soil portion will provide support for the FML and the leachate collection system and act as a back-up in the event of failure of the FML.

The standard for the LCS, i.e., the requirement that it be constructed to maintain less than 30 cm of leachate over the liner, is the same standard required for LCSs at Subtitle C hazardous waste units, and various technologies are available for meeting this requirement (Ref. 3). The appropriate technology depends on the size of the unit, waste permeability, and climatic conditions. LCS design normally consists of a permeable material placed on a sloping surface so as to allow the leachate to be removed and collected. For large units, a pipe drainage system also may be necessary.

The Agency believes that, because of the potential problems associated with leachate recirculation discussed earlier, the design requirements specified above generally are necessary to ensure protection of human health and the environment; however, because the data that EPA has collected on leachate recirculation are limited to laboratory studies (Ref. 24), the Agency is requesting aditional data on leachate recirculation, including pilot studies and field data.

Prior to selecting today's proposed approach, the Agency considered a wide range of options for leachate and gas condensate recirculation and is requesting comment on two additional options. EPA considered allowing waivers to the requirement that an MSWLF have a composite liner in order to recirculate leachate. For example, the waiver could be granted if the owner or operator could demonstrate that: (1) The unit is located over ground water that is not a potential or current underground source of drinking water, and such ground water is not interconnected to a potential or current drinking water source; or (2) recirculation of leachate or gas condensate in the absence of a composite liner or leachate collection system would not result in contamination of ground water; or (3) recirculation of leachate or gas condensate in an existing unit not equipped with a composite liner or leachate collection system would pose lower risks to human health and the environment than disposal of this leachate without recirculation.

Because of the previously mentioned operational problems associated with leachate and gas condensate recirculation and the limited data available, the Agency also is considering a ban on leachate and gas condensate recirculation as an alternative to today's proposal. Under this alternative, for new MSWLF units, the ban could be instituted on the effective date of the revised Criteria and could be phased in for existing units over a period of time, possibly five years, to allow for alternative leachate management practices to be implemented. The Agency recognizes that the area of leachate and gas condensate recirculation will be controversial and, therefore, is seeking comment on a number of issues. The Agency is seeking comment on the appropriateness of the proposed design requirements and whether other designs would provide adequate protection, and whether today's proposed requirement should be modified to allow the State greater flexibility in establishing appropriate design controls. The Agency is requesting comment on the above approaches to granting the waivers and is interested in receiving information on how to develop the necessary waiver demonstrations. Finally, EPA is specifically requesting comments on banning leachate and gas condensate recirculation.

10. Section 258.29 Recordkeeping Requirements

EPA has included a recordkeeping requirement in these proposed Criteria to ensure that a historical record of MSWLF performance is maintained. The owner or operator would be required to maintain the following records: Ground-water monitoring, testing, or analytical data as specified under Subpart E of today's proposal; gas monitoring results; inspection records, training procedures, and State notification procedures as specified under § 258.20 of today's proposal; and closure and post-closure care plans required under proposed §§ 258.30(b) and 258.31(c), respectively. The required information would be recorded as it becomes available, and maintained by the owner or operator of new and existing MSWLFs. This section consolidates the recordkeeping requirements of other sections of today's proposal.

EPA believes that this requirement would ensure the availability of basic types of information that demonstrates compliance with today's requirements. EPA has not defined the time period for retaining these records, required that reports should be submitted, nor specified in what form records should be maintained because the Agency believes it is more appropriate for these requirements to be specified by States, which are directly responsible for implementing these provisions. EPA believes this requirement is flexible enough to allow the States to establish specific requirements for recordkeeping and to determine if additional records should be maintained.

11. Section 258.30 Closure Criteria

Because of the potential threats to human health and the environment posed by MSWLFs, the Agency believes that is necessary to prescribe minimum standards for closing these landfills. Improperly closed landfills, as discussed in a background document (Ref. 3), have the potential for contaminating the environment due to inadequate controls to contain the wastes (e.g., a final cap that erodes and fails to protect the wastes from being exposed). For this reason, the Agency is proposing criteria for closure of MSWLFs in § 258.30 of today's proposal to ensure that owners and operators prevent threats to human health and the environment caused by improper landfill closure.

The closure criteria proposed today specify a closure performance standard that the owner of operator must meet that will minimize the need for maintenance after closure and minimize the formation and release of leachate and explosive gases during the post-closure care period. Owners or operators must prepare a closure plan, to be approved by the State, that describes the activities to be undertaken at the landfill to close it in accordance with the closure performance standard. Because prompt closure of a landfill is important to minimize potential threats to human health and the environment, the Agency is proposing that closure must begin promptly after the final receipt of waste at each landfill unit. To further ensure that closure is conducted properly and in a timely manner, the owner or operator also would be required to submit a certification for each unit at which closure had been completed in accordance with the closure plan. Other details regarding closure (such as deadlines and procedures for submitting, approving, and modifying closure plans; schedules and deadlines for completing closure; and other procedural requirements) would be left to the States in order to allow maximum flexibility without compromising the intent of the closure criteria.

a. Closure Performance Standard. The closure performance standard proposed by the Agency § 258.30(a) of today's rule is designed to ensure that long-term protection of human health and the environment is achieved while providing States with the flexibility to require more specific technical closure requirements. The Agency is proposing a health-based performance standard for the final cover, which is discussed in Section IX. D of this preamble. States are encouraged to specify technical standards for satisfying the closure performance standard (e.g., final cover design and materials, cap permeability) and may wish to refer to technical guidance materials applicable to Subtitle C hazardous waste facilities.

The components of the proposed closure performance standard are consistent with the closure performance standard for Subtitle C hazardous waste treatment, storage, and disposal facilities. First, the MSWLF owner or operator must close each landfill unit (i.e., discrete cells or trenches in a manner that minimizes the need for further maintenance after operations cease. Second, closure activities must minimize the formation and release of leachate and explosive gases after the closure performance standard to the extent necessary to protect human health and the environment. This dual requirement establishes the standard for the closure applicable to all MSWLFs and, at the same time, allows owners or operators and the States to determine the site-specific technical requirements necessary to achieve these general goals of protecting human health and the environment.

The Agency recognizes that many owners and operators manage their landfills in phases and close units (e.g., discret cells or trenches) as they are filled. To ensure that the entire landfill is closed in an environmentall sound manner, the Agency is proposing that all units of the landfill be closed in a manner that satisfies the closure performance standard, including units closed prior to cessation of all operations at the landfill. This requirement also is consistent with the Subtitle C requirements applicable to hazardous waste facilities.

b. Closure Plan. To ensure that the activities and resources necessary to close MSWLFs in a way that will protect human health and the environment have been adequately considered, today's proposed § 258.30(b) would require the owner or operator of each new and existing MSWLF to prepare a written closure plan describing how all units of the landfill will be closed in accordance with the closure performance standard. The closure plan also would serve as a basis for enforcing the closure performance standard and other closure requirements under § 258.30. In addition, this plan would serve as the basis for determining site-specific cost estimates and the amount of financial assurance required under § 258.32. The proposed requirement for a detailed written closure plan is consistent with many State solid waste regulations. A survey of selected State programs indicated that many States currently require the owner or operator to demonstrate that it has prepared for closure of the facility.

Section 258.30(b) of today's proposal specifies the minimum information that must be provided in the closure plan. States are encouraged to supplement these requirements to ensure more complete and adequate closure plans. States may wish to refer to the regulatory and preamble language in 40 CFR Parts 264 and 265, Subpart G, applicable to closure and post-closure care standards for hazardous waste facilities, for guidance in developing more detailed closure plan requirements.

Today's proposal specifies that the closure plan must include (1) an overall description of the methods, procedures, and processes that will be used to close each unit to the landfill in accordance with the closure performance standard, including procedures for decontaminating the MSWLF, (2) an estimate of the maximum extent of operation that will be open during the active life of the landfill, (3) an estimate of the maximum inventory of wastes ever on-site over the active life of the landfill, (4) description of the final cover designed in accordance with § 258.40(b) and § 258.40(c), and (5) a schedule for competing all activities necessary to satisfy the closure performance standard.

The closure plan should provide enough detail to allow the State to evaluate its adequacy. For example, the description of the activities necessary to complete all closure activities should address removing, transporting, treating, or disposing of any waste inventory remaining at the landfill; monitoring the ground-water and managing gas and leachate during the closure period; controlling run-on an run-off; and decontaminating or removing contaminated structures, equipment, and soils. Decontamination procedures include the methods for decontaminating the MSWLF, sampling and testing procedures, and criteria to be used for evaluating contamination levels. The estimate of the maximum extent of operation of the landfill should account for the largest portion of the landfill ever open at any time over the active life of the MSWLF. An area of a landfill is considered open if it has not been closed in accordance with the technical closure requirements in §§ 258.30 and 258.40 (i.e., final cover). Therefore, areas that receive daily cover but are not otherwise closed in accordance with today's provisions would be included in the estimate of the maximum extent of operation. The active life of the facility is defined in § 258.2 as the period from the initial receipt of wastes until certification of closure in accordance with the requirements in § 258.30(e) has been submitted and approved by the State. The estimate of the maximum amount of waste inventory ever handled at the MSWLF at any time over the landfill's active life should be included all wastes awaiting landfilling as well as run-off in trenches, ditches, or collection ponds. The requirements to provide an estimate of the maximum extent of landfill operation and an estimate of the maximum amount of waste on site over the active life of the landfill are important to accurately estimate the cost of closure. Financial assurance for closure must be based on the maximum cost of closing the landfill based on site-specific factors. Knowing the maximum cost of closure ensures that adequate funds for closure are available even if closure takes place earlier than expected.

The description of the final cover should include the design of the final cover, the types of materials to be used, and how the final cover will achieve the objectives of the closure performance standard. Finally, the closure schedule should include the total time required to close each landfill unit and the time for intervening closure activities that will allow the progress of closure to be tracked (e.g., estimates of the time required to decontaminate the MSWLF and to place a final cover).

Because today's rule applies only to MSWLFs, the estimate of the maximum extent of operation, maximum amount of inventory, and the corresponding description of procedures for handling these wastes refer only to those wastes and units that are integrally a part of the operation of the MSWLF (e.g., run-off collection ponds). These regulations are not intended to address closure of other structures or units at the facility that may not be part of the landfill operation (e.g., a surface impoundment used as a sludge drying bed).

c. Closure Plan Deadline and Approval. EPA is proposing in § 258.30(c) to require that the closure plan be prepared as of the effective date of the rule or by the initial receipt of solid waste at the landfill, whichever is later. Based on experience with hazardous waste facilities under Subtitle C, the Agency believes that the proposed deadline for preparing the closure plan is sufficient. A responsible owner or operator already should have considered many of the types of activities required at closure as part of routine operations, especially if the landfill is operated on a cell-by-cell basis and cells are filled and closed successively. The owner or operator of an existing MSWLF may be able to rely extensively on records of closure activities of areas no longer active in preparing the plans (e.g., in developing an appropriate final cover or in determining the type of final cover used).

The Agency also is proposing in § 258.30(c) that the closure plan, and any subsequent modifications to the plan, must be approved by the State to ensure that the plan adequately addresses all of the required activities. This proposal is particularly important because the closure cost estimate and the amount of financial responsibility required are based directly on the activities described in the closure plan. To allow the States maximum flexibility in developing procedures for implementing these rules, the Agency is not proposing specific deadlines and procedures for submitting, approving, and modifying closure plans. The Agency recognizes that many States already have approval procedures in place, making specific Federal requirements unnecessary and potentially burdensome. For example, most of the States surveyed approve closure plans as part of the permitting process and require that subsequent modifications to the plans be subject to State approval. Other States require that owners or operators apply for closure permits prior to closure. In developing an approval process, States may wish to review the procedures included in Subpart G of 40 CFR Parts 264 and 265, and the permitting requirements in 40 CFR Parts 124 and 270 that apply to hazardous waste facilities.

For recordkeeping purposes, the Agency is proposing in § 258.30(c) that the owner or operator maintain a copy of the most recently approved closure plan at the MSWLF facility, or at some other place designated by the owner or operator, until the owner or operator has been notified by the State that it has been released from financial assurance for closure of the entire landfill under § 258.32(f).

d. Triggers for Closure. To ensure that MSWLF units are closed in a timely manner after operations at the unit have ceased and to protect against threats to human health or the environment posed by open but inactive landfills, the Agency is proposing in § 258.30(d) that the owner or operator begin closure activities at each unit, in accordance with the approved closure plan, no later than 30 days after the final receipt of wastes at each landfill unit. Thus, if the MSWLF is operated on an individual cell or trench basis, closure of each cell or trench must begin within 30 days following the final receipt of waste at that unit. Extensions may be granted at the discretion of the State, if the owner or operator of the MSWLF demonstrates that the open landfill unit will not pose a threat to human health or the environment. These closure trigger provisions in § 258.30(d) are consistent with the closure trigger mechanisms for hazardous waste facilities under Subtitle C. States may wish to refer to the language in 40 CFR Parts 264 and 265, Subpart G as guidance for developing more detailed provisions.

The Agency encourages States to define "final receipt of wastes" to preclude MSWLF units from remaining inactive for an indefinite period of time without closing. For example, States may wish to adopt the provisions applicable to hazardous waste facilities that specify that closure of each unit must begin no later than 30 days after the final receipt of hazardous wastes, no later than one year after the most recent receipt of hazardous wastes at that unit. Furthermore, States are encouraged to establish specific criteria for granting extensions of the deadline for beginning closure. For example, the Subtitle C regulations for hazardous waste facilities specify that an extension will be granted only if the owner or operator demonstrates, among other requirements, that (1) the facility has remaining capacity, and (2) the owner or operator is operating in compliance with all applicable regulations and will continue to do so.

As noted above, the Agency is allowing the States to develop their own procedural requirements, imcluding provisions for owners or operators to notify the States of their intent to close their landfill units. States are encouraged to establish notification requirements that provide them with sufficient advance notice to inspect the facility and to ensure that the approved closure plan is still applicable to the facility's current conditions. States may wish to adopt the notification provisions included in the Subtitle C regulations that require advance notice prior to closure of each unit of the landfill. If the State allows the owner or operator to gradually fund a trust fund as demonstration of financial assurance, notice of closure is particularly important to ensure that the trust fund is fully funded at the tme of closure. For example, Subtitle C requires an estimate of the expected year of closure to be included in the closure plan if the owner or operator expects to close the landfill prior to the end of the required trust fund pay-in period.

While today's proposal specifies when closure must begin, the Agency is not proposing deadlines for completing closure of an MSWLF unit. However, the Agency is concerned that the completion of closure not be delayed unnecessarily and is encouraging States to specify deadlines and interim milestones. For example, the Subtitle C regulations for hazardous waste facilities specify a six-month deadline for completing closure and an interim milestone of three months for managing all inventory at the site. Extensions to these deadlines may be granted if (1) the closure activities will take longer than six months to complete or (2) there is a reasonable likelihood that the owner or operator or a person other than the owner or operator will recommence operation of the facility, the landfill has additional capacity to receive waste, and closure would be incompatible with continued operation of the facility. In all cases, if an extension for completing closure is granted, the owner or operator of a Subtitle C facility remains subject to all applicable permit requirements and must take all the necessary steps to ensure protection of human health and the environment. The Agency requests comment on the extent to which the revised Criteria should specify deadlines for completing closure.

e. Closure Certification. The Agency is proposing in § 258.30(e) that following closure of each MSWLF unit, the owner or operator must submit to the State a certification that closure of that unit has been completed in accordance with the approved closure plan. The closure certification must objectively verify that closure has been performed in accordance with the closure requirements, based on a review of the landfill unit by a qualified party. State approval of closure certification will trigger the release of the owner and operator from closure financial responsibility requirements under § 258.32(f) (see Section 13.e below.)

The Agency is leaving to the discretion of the State the types of certifications that satisfy the regulations; in all cases, however, the certification must provide an objective evaluation of site closure, based on a direct review of the MSWLF unit by a party qualified to make such an assessment. Certifications that may satisfy the criteria in today's proposal include written verification by an independent qualified party (e.g., an independent registered professional engineer) or a qualified in-house registered professional engineer at the MSWLF with knowledge about the facility's operations who can objectively evaluate the closure activities, or an on-site review by State inspection officials. While this certification requirement allows the States more discretion than under Subtitle C, the intent of today's proposed rule is consistent with the Subtitle C regulations, which require a hazardous waste facility owner or operator to submit a certification signed by himself and an independent registered professional engineer that closure has been conducted in accordance with the approved plan.

The Agency also is leaving to the States the discretion to specify a deadline for submitting the certification. States may wish to adopt the Subtitle C regulations that require the certifications to be submitted no later than 60 days after the completion of closure of each unit.

12. Section 258.31 Post-Closure Care Requirements

The closure performance standard requires the owner or operator of an MSWLF to close each landfill unit in a manner that minimizes the need for further maintenance and minimizes leachate and gas formation. Even when properly carried out, however, closure cannot guarantee against long-term environmental problems at landfills. For this reason, the Agency is proposing that the owner or operator conduct post-closure monitoring and maintenance as necessary to minimize future threats to human health and the environment following closure of each landfill unit. The post-closure care requirements proposed in § 258.31 of today's rule specify the minimum activities necessary to minimize deterioration of the final cover and to detect problems before they pose a threat to human health and the environment. These activities must be described in the post-closure care plan under proposed § 258.31(c).

An owner or operator must begin post-closure care activities following closure of each landfill unit. The Agency is proposing that this post-closure care period comprise two phases. In the first phase, the owner or operator must perform the post-closure care activities specified in § 258.31(a) for a minimum of 30 years; during the second phase, the owner or operator must continue to conduct certain post-closure care activities specified in § 258.31(b). The length of this second phase would be specified by the State. The post-closure care plan must describe the activities in both phases of post-closure care.

a. Post-Closure Care Activities. During the first 30 years of the post-closure care period, the Agency is proposing that the owner or operator conduct routine maintenance of any final cover, and continue any leachate collection, ground-water monitoring, and gas monitoring requirements as necessary to control the formation and release of leachate and explosive gases into the environment and maintain the integrity of these monitoring systems. Routine maintenance of the integrity and effectiveness of the final cover, proposed in § 258.31(a)(1), is necessary to prevent liquids from penetrating into the closed landfill and creating the potential for leachate migration. Required activities include repairs to the final cover to correct the effects of settling, subsidence, erosion, or other events, and preventing run-on and run-off from eroding or damaging the cover. Cover maintenance also includes periodic cap replacement, which is necessary to remediate the effects of routine deterioration. These activities are intended to promote the Agency's overall goal of minimizing liquids in landfills and are the minimum steps the Agency believes are necessary to protect human health and the environment in the long term. The Agency believes that these requirements also should provide an incentive to properly manage solid wastes (e.g., ensuring proper compaction of wastes) during the active life of the landfill.

The Agency is proposing in § 258.31(a)(2) that owners or operators of MSWLFs designed with liner(s) and leachate collection systems continue to operate and maintain the leachate collection system during the post-closure care period in accordance with the requirements of § 258.40(b). Experience has shown that leachate generation in landfills continues long after closure. Therefore, to avoid leachate collecting on top of the liner and causing the "bathtub effect," the owner or operator must continue to remove leachate from the collection system during the post-closure care period until leachate no longer is collected in the system.

Proposed § 258.31(a)(3) would require the owner or operator to conduct ground-water monitoring during the first 30-year post-closure care period in accordance with the requirements in § 258.50 and maintain the ground-water monitoring system. The fundamental purpose of monitoring during the post-closure care period is to detect ground-water contamination in a timely fashion should the waste containment structures fail and to trigger corrective action as soon as contamination occurs. Long-term monitoring is essential to detect releases due to design or operating errors (e.g., tearing of liners or disposing of wastes that are incompatible with the liner) and routine deterioration of liner. Particularly for landfills designed with advanced containment systems (e.g., liners, leachate collection systems, or synthetic final caps), ground-water contamination may be delayed for many years, thus increasing the need for long-term monitoring. Because ground-water monitoring wells are subject to routine deterioration, post-closure activities also should include the periodic replacement of these wells as needed.

Finally, § 258.31(a)(4) proposes to require the owner or operator to monitor for methane in accordance with § 258.23. That section requires the owner or operator to ensure that methane generated by the landfill unit does not accumulate in landfill structures (excluding gas control or recovery system components) in concentrations in excess of 25 percent of the lower explosive limit for methane. The concentration of methane gas at the MSWLF facility property boundary also must not exceed the LEL.

Following completion of the first phase of post-closure care at each landfill unit, today's proposal would require the owner or operator to conduct a second, less-intensive phase of care. The purpose of this second phase is to ensure that a minimum level of care is continued to detect any release that might occur at an MSWLF in the long term, while at the same time minimizing the burden on the owner or operator of continuing extensive post-closure care activities for an extended period of time. Therefore, the Agency is proposing under § 258.31(b) that the owner or operator must continue, at a minimum, ground-water monitoring and gas monitoring in order to detect any contamination that might occur beyond the first 30 years of post-closure care. States would have the responsibility of specifying the duration of this second phase.

The Agency is proposing this second phase of post-closure care for a number of reasons. First, even the best liner and leachate collection systems will ultimately fail due to natural deterioration, and recent improvements in MSWLF containment technologies suggest that releases may be delayed by many decades at some landfills. For this reason, the Agency is concerned that while corrective action may have already been triggered at many facilities, 30 years may be insufficient to detect releases at other landfills. The Agency, therefore, wants to ensure that any potential release will be detected regardless of when it occurs. Finally, in the absence of sufficient data to follow the Agency to predict with certainty when containment systems are likely to fail, a second phase of reduced post-closure care ensures that releases will be detected while minimizing costs to the regulated community.

The Agency is proposing minimum requirements for this second phase of care to allow States maximum flexibility in tailoring the scope of the requirements and the duration of this period to site-specific circumstances. For example, if a release is detected at an MSWLF during the second phase of care, the State may specify increased post-closure activities to be carried out as necessary. For facilities located in vulnerable environmental settings, the State may wish to require the owner or operator to continue during this second phase of care many of the activities conducted during the first phase. In addition, for vulnerable or high hazard settings, the Agency expects States to specify extended second-phase care periods. In those cases in which corrective action is still underway at the end of the first phase of post-closure care, the Agency expects States to require the second phase of post-closure care to extend for the duration of the corrective action period, at a minimum.

In addition to the minimum post-closure activities specified in today's proposal, the Agency encourages States to specify more detailed post-closure care requirements, such as maintaining the vegetative cover through periodic mowing, replanting, and regrading to preclude erosion that occurs naturally over time and as a result of servere storms, and repairing the cap when necessary to prevent the cap from becoming permeable. Other post-closure care requirements could include security measures if access to the MSWLF facility could pose a health hazard. In addition, the Agency encourages the States to specify deadlines for submitting monitoring data and other recordkeeping requirements to facilitate the detection of potential problems at the site in a timely manner. The Agency requests comment on the appropriateness of incorporating these and other post-closure care requirements.

The types of post-closure care requirements proposed today closely parallel those applicable to Subtitle C facilities. In addition, the post-closure care activities proposed in today's rule are consistent with existing State solid waste management requirements based on the Agency's review of several States' solid waste regulations (Ref. 21). All of the State programs reviewed require, at a minimum, post-closure site maintenance, leachate control, and ground-water monitoring. In addition to these activities, many States surveyed require additional post-closure activities such as surface water monitoring. The Agency in no way means to preclude States from requiring such activities.

b. Length of Post-Closure Care Period. As noted above, the Agency is proposing that, following closure of each MSWLF unit, the owner or operator must conduct two phases of post-closure. In the first phase of post-closure care, the owner or operator must conduct all of the post-closure care activities specified under ¶ 258.31(a) for a minimum of 30 years. The State has the discretion to extend the period beyond 30 years. Subtitle C establishes a 30-year post-closure period and allows the Regional Administrator to either reduce or extend the length of the period based on site-specific demonstrations. As discussed above, the Agency is concerned that releases may not occur until after 30 years. In fact, the Agency currently is considering extending the length of the post-closure care period well beyond 30 years for hazardous waste facilities located in certain environments likely to pose significant threats to human health and the environment. Therefore, today's rule proposes that the first phase of post-closure care must continue for a minimum of 30 years, with the option for States to require a longer period if deemed appropriate.

Section 258.31(b) proposes a second, less intensive phase of post-closure care designed to ensure the detection of releases, but leaves to the States the flexibility to specify the appropriate length of this period. States may specify a standard period of care for all landfill units, or determine an appropriate period on a case-by-case basis (e.g., at the time the MSWLF is applying for a permit or within a specified period after the effective date of the regulations). While the first option would reduce the burden on the States, the second option could allow for better protection against releases of hazardous constituents to the environment by adapting the post-closure care period to site-specific circumstances.

The Agency considered requiring an extended post-closure care period for MSWLFs with an option to reduce the period only if the owner or operator could demonstrate that a reduction in the period would not pose any threat to human health and the environment; however, the Agency was concerned that this approach could be overly stringent and potentially burdensome to the owner or operator and to the State to establish the criteria for terminating the post-closure care period. The Agency also considered allowing the State the discretion of reducing the 30-year post-closure care period based on cause, consistent with the Subtitle C requirement for hazardous waste facilities. As discussed above, however, because improvements in containment technology may delay the detection of releases, the Agency is concerned that reducing the period to less than 30 years could result in future releases not being detected. Finally, the Agency considered requiring periods consistent with some of the State post-closure care periods (e.g., 5, 10, or 20 years). In the absence of empirical data from the States, however, the Agency is not convinced that these shorter periods are adequate to ensure the protection of human health and the environment.

EPA is not proposing criteria and procedures for determining the length of the second phase of the post-closure care period although States are encouraged to do so. States may wish to consider several criteria when evaluating the appropriate length of the second phase of the post-closure period. For instance, the liner and cover design, age, stability, and operating record (including ground-water monitoring results that show changes in constituent concentrations over time) of existing landfills are useful factors in estimating the potential for leachate and gas release. Other factors include leachate quality (e.g., volume and physical characteristics), hydrogeologic characteristics of the site, the potential for human exposure, and the expected future use of the facility and surrounding land. The State also may wish to list in the regulation the types of demonstrations that owners or operators must make to terminate the post-closure care period.

The Agency is requesting comments on the appropriate length of the post-closure care period for MSWLFs. In particular, the Agency is requesting comments on the two-phased approach and information on the frequency and timing of releases from MSWLFs, criteria that should be used to evaluate the length of the post-closure care periods, appropriate demonstrations for terminating the post-closure care period, and other information based on experiences with closed landfills.

c. Post-Closure Plan. EPA is proposing in § 258.31(c) to require the owner or operator of an MSWLF to prepare a written post-closure plan that includes descriptions of the monitoring and maintenance activities required in § 258.31(a) and (b) for each MSWLF unit and the frequency with which these activities will be performed during both phases of post-closure care. The fundamental objective of monitoring is to ensure that any migration of contaminants is detected in a timely fashion. In many instances, post-closure monitoring will be a continuation of the monitoring activities conducted during the landfill's active life. The description of maintenance activities necessary to ensure the integrity of the waste containment systems should include routine maintenance that reasonably can be expected to be required after closure of each unit (e.g., mowing, fertilization, erosion control, and rodent control) and the frequency with which these activities will be performed. These monitoring and maintenance requirements are consistent with State regulations examined by the Agency.

EPA is proposing in § 258.31(c)(2) that the post-closure plan also include the name, address, and telephone number of the person or office to contact about the MSWLF during both phases of the post-closure care period. This requirement would ensure that, if emergency measures or long-term corrective measures are necessary after closure, a person familiar with the landfill design, the types of wastes handled, past operating problems, etc., will be available.

The Agency also is proposing under § 258.31(c)(3) that the post-closure plan include a description of the planned uses of the property during both phases of the post-closure care period. One example of an acceptable use of a closed landfill would be a recreational park, provided the park complies with the requirements of § 258.31(c)(3). Under the proposed § 258.31(c)(3), the post-closure use of the property must not disturb the integrity of the final cover, waste containment system, or function of the monitoring systems unless the State determines that the activities (1) will not increase the potential threat to human health or the environment or (2) are necessary to reduce a threat to human health or the environment. For example, a foundation structure installed in a closed MSWLF may disturb the integrity of the cap, present potential safety problems as result of migrating landfill gas, and result in structure failure. Interference with the operation of the monitoring systems could prevent timely detection of ground-water contamination or gas concentrations greater than the established health-based limit. Unmonitored access to the property after closure also could result in the release of hazardous constituents or actual exposure of buried wastes as a result of disturbances of the site. If an owner or operator wishes to remove any wastes, waste residues, the liner, or contaminated soils at any time during the post-closure care period, it must obtain approval from the State and demonstrate that disturbing the site will not increase the threat to human health and the environment. These requirements are consistent with the Subtitle C requirements for hazardous waste facilities.

d. Post-Closure Plan Deadline and Approval. Consistent with the closure plan requirements, the Agency is proposing to require under § 258.31(d) that the post-closure plan be prepared as of the effective date of the rule or by the initial receipt of solid waste at the MSWLF, whichever is later. This section also requires that the post-closure plan, and any subsequent modification to the plan, be approved by the State. As described above, the Agency is leaving specific procedural requirements such as deadlines and procedures for submitting, approving, and modifying post-closure care plans to the individual States. Finally, proposed § 258.31(d) requires the owner or operator to maintain a copy of the most recent approved post-closure plan at the MSWLF facility or at some other location designated by the owner of operator. The plan must be maintained from the onset of the post-closure care period until completion of the post-closure care period has been certified in accordance with § 258.31(f) (see Section 12.f below) and the owner or operator has been notified by the State that it has been released from financial assurance for post-closure care for the entire landfill under § 258.32(g).

e. Notation on the Deed to Property. The Agency is proposing in § 258.31(e) that, following closure of the entire MSWLF, the owner or operator must record a notation on the deed or some other instrument normally examined during a title search that will notify any potential purchaser that: (1) The land has been used as an MSWLF and (2) its use is restricted under § 258.31(c)(3). This notation on the deed is intended to assure that the land use is restricted in perpetuity. The owner or operator may ask permission to remove the notation on the deed if all wastes are removed in accordance with the provisions in § 258.31(c)(3). Under the Subtitle C requirements for hazardous waste disposal facilities, an owner or operator must record a notice on the deed following closure of the first unit and after final closure to provide additional assurance that all parties are aware of the use of the property. While today's proposed rule does not require that a notation to the deed by filed after closure of each landfill unit in order to minimize burdens on the owner or operator, States may wish to adopt this more stringent requirement.

According to the Agency's survey of State requirements, some States already have procedures for ensuring that the post-closure use of landfill property is restricted. Some States require a notation to be put on the property deed; other States require that proposed future land use be subject to Agency review and approval.

States may wish to specify additional notification requirements for MSWLFs as required under Subtitle C. For example, submission of a survey plat indicating the location and dimension of landfill units, a record of waste including the type, location, and quantity of waste disposed of in each landfill unit, and a certification that the deed notation has been recorded are all required under Subtitle C regulations.

f. Post-Closure Care Certification. The Agency is proposing in § 258.31(f) that following the completion of the second phase of the post-closure care period for each unit, the owner or operator submit to the State, a certification that both phases of post-closure care have been conducted in accordance with the approved post-closure plan. Consistent with the closure certification, the post-closure care certification must objectively verify that post-closure care has been performed in accordance with the post-closure care requirements based on a review of the landfill unit by a qualified party. As discussed above for closure certifications, the Agency is proposing to leave to the State the discretion to specify the types of certfications that would provide such an objective assessment.

Today's proposal requires that the certification be submitted at the completion of the second phase of the post-closure care period for each unit. This requirement is consistent with these for hazardous waste facilities under Subtitle C. Because of the duration of the post-closure care period, the States may wish to require periodic interim certifications (e.g., every five or 10 years or at the time of the permit renewal, if applicable) to confirm that activities are being conducted properly. Alternatively, States may wish to consider requiring a certification after the end of each of the two phases of post-closure care.

13. Section 258.32 Financial Assurance Criteria

Under today's proposed rule, the owner or operator of a new or existing MSWLF would be required to demonstrate financial assurance for the costs of conducting closure, post-closure care, and, if applicable, corrective action for known releases. (Under proposed § 258.57, whenever the ground-water protection standard is exceeded, an owner or operator must conduct a corrective action program to treat in place or remove any Appendix II hazardous constituents exceeding the standard.) The purpose of financial assurance is to ensure that the owner or operator adequately plans for the future costs of closure, post-closure care, and corrective action for known releases, and to ensure that adequate funds will be available when needed to cover these costs if the owner or operator is unable or unwilling to do so. To demonstrate to the State that it has planned for future costs, the owner or operator must prepare written cost estimates. These cost estimates would serve as the basis for determining the amount of financial assurance that must be demonstrated.

Today's proposed financial assurance requirements for closure, post-closure care, and corrective action for known releases at MSWLFs are patterned after the financial assurance provisions for hazardous waste facilities under Subtitle C and proposed provisions for underground storage tanks under Subtitle I. Financial assurance for closure and post-closure care for MSWLFs is currently required in numerous States. Although financial assurance for corrective action is less frequently required by States, the Agency believes that provision of financial assurance to cover the costs of corrective action for known releases is important to ensure that funds for long-term remedial activities are provided by the owner or operator.

The Agency is not proposing at this time to require financial assurance for other than known releases due to the complexity of the analysis that would be required to estimate probable corrective action costs associated with releases from MSWLFs. For example, to require a facility with a high probability of a release to demonstrate financial assurance for corrective action costs in the event of a release would require a characterization of the risks posed by a facility as well as the potential size, impact, and costs to remedy such releases. Such facility risk analyses could require considerable time to complete and also could delay the adoption and implementation of regulations by States. The Agency requests comments on this decision and information concerning how such cost estimates could be derived in the event additional corrective action financial responsibility requirements are proposed in the future.

The Agency also considered requiring owners or operators of MSWLFs to demonstrate financial assurance for third-party liability to compensate injured third parties. For a number of reasons, however, the Agency has decided to defer proposing such liability requirements at this time. First, the Agency is concerned that it does not have sufficient data at this time to specify the amount of liability coverage that would be appropriate for an MSWLF. Unlike Subtitle I, which mandates a minimum level of coverage for underground storage tanks, the statute does not specify any minimum financial assurance requirements for MSWLFs. To date, few claims data exist concerning third-party awards resulting from releases at MSWLFs. While more data are available to assess potential claims from Subtitle C facilities, the Agency is reluctant to extrapolate from these data or to adopt directly the levels of coverage required for Subtitle C facilities without further analysis comparing the risks and resultant third-party claims from MSWLFs and Subtitle C hazardous waste facilities.

Second, RCRA Section 4010(c) allows the Agency discretion to take into account the practicable capability of MSWLFs when developing the new criteria. Today's proposal applies an extensive set of new regulations to a large universe of waste facilities. Therefore, in light of the costs associated with implementing today's proposed requirements, the lack of available data on awards for third-party damages, and the current constraints in the insurance market, the Agency has tentatively decided to defer any third-party liability requirements. Instead, the Agency has chosen to focus on financial assurance requirements for costs of activities that are certain to be incurred (i.e., closure, post-closure care, and corrective action for known releases). In deferring these requirements, the Agency hopes to provide more time for the liability insurance market to adjust to a new potential market. The Agency adopted a similar approach when promulgating liability coverage requirements for Subtitle C requirements when it phased in the requirements over a three-year period to allow the market to adjust to the demand for increased capacity.

Deferring third-party liability coverage requirements at the time, however, does not preclude the Agency from promulgating such a requirement for MSWLFs at a later date. Further, the Agency encourages States to consider requiring such coverage if they choose. This decision to defer these financial assurance requirements in no way relieves an owner or operator of liability should injury to third parties be shown to have resulted from the operation of MSWLFs.

The Agency requests comments on this decision to defer requirements for financial assurance for third-party liability costs at this time. In particular, the Agency requests information to assist in setting appropriate levels of liability coverage for MSWLFs, including data on the number of claims filed, the size of settlements or awards resulting from injuries associated with releases from MSWLFs, the causes of such injuries, and the number of persons harmed. Data concerning the nature, size, probability of, and potential exposures to releases from MSWLFs could also be used in developing liability coverage requirements. EPA also requests information on the likely availability and cost of insurance coverage and other financial instruments for liability coverage, the factors that might affect the cost and availability coverage, the factors that might affect the cost and availability of financial assurance instruments, the potential burden on owners or operators of obtaining financial assurance, and the advisability of phasing in financial responsibility requirements for third-party liability as done under Subtitle C.

Today's rule proposes that the amount of financial assurance for closure, post-closure care, and corrective action for known releases be based on site-specific cost estimates. The Agency is not proposing in today's rule the types of mechanisms that may be used to demonstrate financial assurance. Rather, today's proposal establishes a performance standard that specifies a set of criteria that must be satisfied by any mechanism that is used. Regardless of the mechanism chosen, it must ensure that adequate funds are available in a timely manner whenever they are needed. This approach provides the regulatory community and the States the maximum flexibility in satisfying the financial assurance requirements.

a. Applicability. Today's proposal would apply to each owner and operator of an MSWLF except for an owner or operator who is a State or Federal government entity. Although these proposed requirements would apply to both the MSWLF owner and the operator, only one would be required to demonstrate financial assurance for the MSWLF. This requirement is consistent with those under Subtitles C and I. This option provides flexibility to the regulated community by allowing them to choose which party will demonstrate financial assurance while, at the same time, giving the State the additional assurance that funds will be available by holding both parties ultimately responsible. EPA considered, but rejected, the option of requiring both the owner and operator to demonstrate financial assurance. While such an approach might provide somewhat greater assurance that the costs of closure, post-closure care, and corrective action for known releases would be covered in the event that one party failed to provide adequate funds, the Agency believes that, in most cases, this "double" coverage would be unnecessary and would substantially increase the burden on owners and operators of MSWLFs.

EPA recognizes that because Federal and State government entities are permanent and stable institutions that exist to safeguard health and welfare, they have the requisite financial strength and incentives to cover the costs of closure, post-closure care, and corrective action for known releases. The Agency believes, therefore, that it is not necessary to impose financial assurance requirements on MSWLFs owned or operated by government entities whose debts and liabilities are the debts and liabilities of a State or the United States. This exemption also extends to cases in which an MSWLF is owned by a State or Federal government entity and operated by a private party (or operated by a State or Federal government entity while owned privately). A State or Federal owner may, of course, require the private operator by contractual agreement to provide financial assurance. The exemption for MSWLFs owned or operated by Federal or State governments is consistent with the approach adopted under both the Subtitle C regulations applicable to owners or operators of hazardous waste facilities and the proposed Subtitle I rules for underground storage tanks containing petroleum.

The Agency also is considering whether to treat Indian Tribes, having Federally recognized governing bodies that carry out substantial governmental duties and powers over any area, as States. If so, they would be considered exempt from financial assurance requirements. If Indian Tribes are not exempt, they would be required to demonstrate financial assurance similar to local governments. The Agency requests comment on whether to exempt Indian Tribes from financial responsibility requirements. Specifically, the Agency requests information on whether Indian Tribes have the requisite financial strength and incentives to cover the costs of closure, post-closure, and corrective action for known releases.

With regard to financial assurance requirements for local governments, EPA carefully considered whether to require municipal owners and operators of MSWLFs to demonstrate financial assurance for the costs of closure, post-closure care, and corrective action for known releases. While the Agency recognizes that many local governments, like Federal and State governments, are permanent entities and act to secure the well-being of their citizens, the Agency is concerned that local governments cannot provide the same guarantee that they will be able to access adequate funds to pay for environmental costs in a timely manner.

EPA has determined that, relative to Federal and State government entities, local government entities generally: (1) Have more limited financial resources and less flexibility in their annual budgets, making reallocation of a substantial amount of funds for a specific purpose in a given year extremely difficult; (2) cannot necessarily access the traditional sources of municipal financing (i.e., intergovernmental transfers, bond issues, and taxes) quickly enough to ensure funding in a timely manner; and (3) have been more prone to fiscal emergencies than Federal and State government entities. The Agency believes, therefore, that local government entities should be subject to financial assurance requirements as a tool to induce advanced planning for the future environmental costs of closure, post-closure care, and corrective action for known releases. Moreover, the Agency believes that requiring local governments to demonstrate financial assurance may help them to raise funds for these costs that they ultimately will have to cover.

b. Cost Estimates. EPA is proposing in § 258.32 (b), (c), and (d) that the owner or operator of each MSWLF develop written site-specific estimates of the costs of conducting closure, post-closure care, and corrective action for known releases that would be used to determine the amount of financial assurance required under § 258.32 (f), (g), and (h). These cost estimates must account for the costs, in current dollars, of a third party conducting the activities described in the closure and post-closure plans and in the corrective action program as specified in §§ 258.30, 258.31, and 258.58. The "third party" provision ensures that adequate funds will be available for the State to hire a third party to conduct closure, post-closure care, and corrective action in the event that the owner or operator fails to fulfill these obligations. These requirements parallel the requirements or proposed requirements under Subtitles C and I.

The closure cost estimate must be based on the cost of closing the MSWLF at the point in the landfill's active life when the extent and manner of its operation would make closure (as described in the closure plan) the most expensive. For example, if an owner or operator operates the MSWLF on a cell-by-cell basis, the estimate should account for closing the maximum area of the landfill ever open at any time.

The Agency is proposing that the owner or operator develop estimates of the costs of hiring a third party to conduct post-closure care activities for each phase of the post-closure care period. The cost estimate for each phase must be based directly on the activities described in the post-closure care plan required under § 258.31(c) and account for the entire landfill. The estimate for each phase would be derived by multiplying the annual costs (in current dollars) of the activities by the number of years of care required in that phase. This approach is similar to the Subtitle C calculation of the post-closure care cost estimate, in which the cost estimate is determined by multiplying the annual post-closure cost estimate by the number of years of post-closure care. Because not all post-closure care activities are conducted on an annual basis (e.g., cap replacement or monitoring well replacement may only be required periodically), the total cost estimate must be adjusted to include these periodic costs as well as the annual costs. To ensure that adequate funds would be available for the entire post-closure care period, the Agency is requiring that the post-closure care cost estimates for each phase of post-closure care account for the most expensive costs of routine post-closure care. For example, the costs of monitoring during the first 30-year phase should account for the most extensive monitoring likely to be required.

As noted above, Subpart E of today's rule proposes to require that whenever the ground-water protection level at the MSWLF is exceeded, an owner or operator must conduct corrective action. Once a release has been detected, the owner or operator must prepare an estimate of the cost of the corrective action program, calculated by multiplying the annual costs of remedial actions and the number of years required to complete the corrective action program.

The proposed rule would require the closure and post-closure cost estimates to be adjusted annually for inflation until the entire landfill has been closed. The cost estimate for corrective action activities must be updated for inflation until the end of the corrective action period even if it extends beyond closure of the MSWLF. These requirements are consistent with the Subtitle C requirements. Also consistent with Subtitle C requirements, today's proposal would not require the owner or operator to update the post-closure cost estimate after the entire landfill has been closed; however, the Agency requests comment on the desirability of requiring annual adjustments of the post-closure cost estimate during the post-closure care period to prevent a significant shortfall in funds, which could result from not accounting for future inflation.

The Agency suggests that the States require the use of inflation factors that are readily available to owners and operators (e.g., Implicit Price Deflator for Gross National Product as published in the "Survey of Current Business," a Department of Commerce publication) or specify other inflation factors that must be used to adjust the estimates. States may wish to refer to the provisions in 40 CFR 264.142 and 264.144 and the accompanying guidance materials in developing these requirements.

In addition to updating estimates for inflation, today's proposed rule also would require that the owner or operator increase the closure and post-closure cost estimates when changes to the plans or changes at the facility during the active life increase the cost estimates (e.g., increase in design capacity, increase in the maximum area open, more extensive monitoring requirements). Similarly, today's rule proposes that an owner or operator must increase the corrective action cost estimate anytime a change in the corrective action program or in the facility conditions increases the cost estimate.

Whenever the cost estimates are increased, the owner or operator must increase the level of financial assurance required under § 258.32 (f), (g) and (h). If the owner or operator can demonstrate that changes in the facility result in a decrease in the maximum costs of closure over the active life of the landfill (e.g., reduction in size of the area to be used for the landfill), the owner or operator may submit a request to the State to reduce the closure cost estimate. The owner or operator may request a reduction in the amount of the post-closure care cost estimate if the owner or operator can demonstrate that the cost estimate exceeds the maximum cost of post-closure care over the remaining post-closure care period. Because the proposed rule would not require the post-closure cost estimate to be adjusted for inflation during the post-closure care period, the State should account for future inflation in determining if the estimate exceeds the remaining costs to be incurred over the length of the period. Because the corrective action cost estimate is adjusted for inflation until the completion of the program, the owner or operator may more easily be able to demonstrate that the original estimate exceeds the remaining costs to be incurred.

The Agency is not proposing procedures or deadlines for estimating and adjusting cost estimates. However, the Agency encourages States to do so and refers them to the Subtitle C provisions in 40 CFR 264.142 and 264.144 for guidance. In addition, the Agency strongly encourages States to consider carefully all requests for reductions in cost estimates to ensure that shortfalls in coverage do not result. The Agency asks for comments on whether the revised Criteria should include procedures or deadlines for estimating and adjusting cost estimates.

For recordkeeping purposes, the owner or operator must maintain copies of the most recent cost estimates for closure, post-closure care, and corrective action for known releases at the landfill unit until the owner or operator has been released from financial assurance for that activity under § 258.32 (f), (g), and (h). These provisions are consistent with requirements under Subtitle C.

c. Performance Standard for Financial Assurance. In order to minimize the number of specific procedural requirements applicable to demonstrating financial assurance and provide maximum flexibility to the States, the Agency is not specifying in the proposed regulation the types of financial assurance mechanisms that would be allowable; however, the Agency is concerned that the mechanisms allowed by the States (e.g., trust funds, letters of credit, State fund) satisfy the overall ojbectives of financial assurance, i.e., to ensure that adequate funds are readily available to cover the costs of conducting closure, post-closure care, and corrective action for known releases if the owner or operator fails to do so. Therefore, the Agency is proposing in § 258.32(e) of today's rule a performance standard for financial assurance that must be satisfied to demonstrate financial assurance under § 258.32 (f), (g), and (h).

Under the performance standard, financial assurance mechanisms allowed by a State must: (1) Ensure that the amount of funds assured is sufficient to cover the costs of closure, post-closure care, and corrective action for known releases when needed; (2) ensure that funds will be available in a timely fashion when needed; (3) guarantee the availability of the required amount of coverage from the effective date of these requirements or prior to the initial receipt of solid waste, whichever is later, until the owner or operator is released from financial assurance requirements under § 253.32(f), (g), and (h); (4) provide flexibility to the owner or operator; and (5) be legally valid and binding and enforceable under State and Federal law.

The financial assurance mechanisms authorized under Subtitle C and proposed under Subtitle I, if properly drafted, satisfy these performance criteria. Subtitle C allows the use of a trust fund, letter of credit, surety bond, insurance, financial test, corporate guarantee, State-required mechanism, State assumption of responsibility, or a combination of certain mechanisms to demonstrate financial assurance for closure and post-closure. (Insurance was not proposed for corrective action financial assurance under Subtitle C because the Agency determined that it would not be available.) The proposed Subtitle I regulations (52 FR 12786, April 17, 1987) allow a similar set of instruments to demonstrate financial assurance for corrective action and liability coverage. States may wish to refer to the background document for closure and post-closure care and financial responsibility (Ref. 4) for more information on the use of these mechanisms in other EPA financial assurance programs and guidance on how these mechanisms could be structured to satisfy the performance standard discussed below.

The financial assurance performance standard in today's proposal would require States to adopt a program under which the selected range of financial assurance mechanisms ensures that sufficient funds will be available to cover the costs of conducting closure, post-closure care, and corrective action for known releases whenever such funds are needed. In most cases, the amount of funds assured should equal the full amount of the current site-specific cost estimates for closure, post-closure care, and corrective action at the time the mechanism is established. For example, if a letter of credit issued by a bank is an allowable mechanism, its face value must equal the site-specific cost estimate. To minimize the burdens on small owners or operators who may have to set aside funds in a trust to demonstrate financial assurance, States may wish to adopt the approach used under Subtitle C. Under Subtitle C, an owner or operator is allowed to build up the trust fund over the life of the facility or over 20 years (10 years for permitted facilities), whichever is shorter. To meet the performance standard criteria under today's proposal, if a build-up period is allowed for trust funds, the State must require the trust to be fully funded no later than the end of the landfill's active life. States may wish to adopt stricter trust fund requirements (e.g., shorter build-up period, accelerated payments into the trust in the earlier years of operations) to avoid potential shortfalls if the MSWLF is closed earlier than expected. If a State chooses to develop a State fund to be used for the costs of closure, post-closure care, and corrective action for known releases, the size of the fund must be commensurate with the expected costs likely to be incurred to satisfy the performance standard.

To ensure that funds will be available when needed, States also may need to take into account potential legal and political constraints on accessing funds guaranteed by financial mechanisms. For example, because the U.S. EPA Regional Administrator does not have the authority to directly receive funds from third-party financial assurance mechanisms (i.e., all monies received must be directed to the U.S. Treasury), under Subtitle C a standby trust fund must be established when certain instruments are used (e.g., letter of credit and surety bond) to serve as a depository for the funds if the Regional Administrator draws on the instrument. Some States may face similar constraints in accepting funds directly from third parties and may need to establish standby trust fund requirements for certain mechanisms (e.g., letters of credit) to ensure that the State has access to the funds whenever they are needed.

Because of the long period between the initial establishment of the financial assurance mechanism and the time that the costs are incurred, the performance standard requires that the mechanisms guarantee continued availability of coverage until the owner or operator establishes an alternate financial assurance mechanism or is released from financial assurance requirements to avoid potential gaps in coverage. To ensure reliability over time, States should establish provisions that address contingencies such as (1) bankruptcy or incapacity of the financial assurance provider or the landfill owner or operator and (2) cancellation or termination of mechanisms by the provider. To prevent gaps in coverage in the event of these contingencies, States must ensure that owners or operators establish alternate financial mechanisms in a timely manner. For example, States could require that only after obtaining alternate assurance could the present mechanism be cancelled or terminated. States also could specify notification requirements and time limits for providing alternate financial assurance, similar to provisions under Subtitle C. Furthermore, States may wish to adopt provisions similar to Subtitle C regulations that require certain mechanisms to be automatically renewed unless an alternate financial assurance mechanism has been established, or else the third party offering the instrument becomes liable for the obligation. Finally, States must ensure that owners or operators of MSWLFs cannot terminate financial assurance at will, which could jeopardize the availability of funds when necessary. For example, Subtitle C requires that financial assurance cannot be terminated until after the certifications of closure or post-closure care have been received and approved.

In authorizing financial assurance mechanisms for demonstrating financial assurance, States should provide a range of mechanisms to provide owners or operators of MSWLFs with flexibility for demonstrating compliance while at the same time ensuring that they meet the regulatory requirements. For example, the Agency would not consider a program sufficiently flexible if that program restricted owners or operators to using only a financial test or insurance because such restrictions would likely impose a significant burden on much of the regulated community.

Finally, under the performance standard, the financial assurance mechanisms must be legally valid and binding. The validity of such mechanisms will largely be a matter of State law. However, to be legally valid, a financial assurance mechanism must be issued by an institution that has the legal authority to issue the mechanism and that is legally acceptable and/or regulated by a Federal or State agency. Financial assurance mechanisms also must be enforceable under State and Federal law. To help ensure that the mechanisms are enforceable, States may wish to specify wording for the mechanisms consistent with the regulations found in 40 CR 264.151. These mechanisms are discussed in a background document to this proposed rule (Ref. 4).

In proposing a financial assurance performance standard rather than specific financial assurance mechanisms, the Agency has sought to minimize inconsistencies with the approximately 20 States that already have financial assurance requirements for MSWLFs. The Agency recently conducted case studies of nine such programs (Ref. 19). The study found considerable variation among State programs both in the types of mechanisms allowed and in the procedural requirements for the financial assurance mechanisms. For additional detail on the results of the case studies, see the financial assurance background document to this rulemaking (Ref. 19). Today's proposal is, therefore, designed to accommodate the variations among existing State programs, while ensuring that all programs meet the performance standard for financial assurance. The Agency requests comments on the proposed financial assurance performance standard, including the use of this standard rather than identifying a list of acceptable financial assurance mechanisms.

d. Financial Assurance Provisions for Local Governments. As noted in the previous section, the Agency is not proposing specific financial mechanisms in today's rule in order to provide maximum flexibility to the States. The Agency believes that the Subtitle C provisions can be used as models for States in developing their rules. Unlike Subtitle C, however, the majority of MSWLFs are owned by local governments. While Subtitle C allows a financial test to be used to demonstrate financial assurance, the test in 40 CFR 264.143 and 264.145 is designed primarily for corporate firms and is not directly applicable to local governments. Therefore, because of the large number of MSWLFs owned by local governments, the Agency considered for today's rule the feasibility of developing a financial test that would exempt local governments able to pass the test from having to obtain a third-party financial assurance mechanism (or contribute to a State Fund, if applicable).

A financial test designed specifically for local governments was considered during the development of the Subtitle C regulations but was not included due to difficulties in interpreting and verifying municipal accounting information, concern over the use of bond ratings as a measure of fiscal strength, and concern over the accessibility of allocated tax revenues. However, since the promulgation of the Subtitle C requirements, many local governments have developed more sophisticated financial management practices. Because of these changes, the Agency is examining possible approaches a State might use in developing such a test specifically for lcoal governments. For example, the Agency is examining the feasibility of developing a special test that takes into account fiscal, institutional, and other factors. Although the Agency is not proposing a financial test for local governments in today's rule, the financial assurance background document discusses a framework that States may wish to use in specifying criteria for a financial test for local governments (Ref. 4). If a State decides to allow a financial test for local governments, the framework should be useful in choosing appropriate measures of a local government's financial strength.

The Agency requests comments on the use of a financial test for local governments. Specifically, EPA requests information on standards that might be used to measure a local government's financial strength, the measures that might be taken to establish such a financial test, and whether any States currently allow a financial test for local governments.

e. Financial Assurance Requirements. As noted in Sections 13.b and c, site-specific cost estimates are used to determine the amount of financial assurance required. The mechanisms used to demonstrate this amount of coverage must satisfy the performance standard specified in § 258.32(e).

The amount of closure financial assurance must be based directly on the most recent closure cost estimate adjusted for inflation in accordance with § 258.32(b). Financial assurance for post-closure care must cover the costs of conducting both phases of the post-closure care period for the entire landfill. The amount of financial responsibility required for each phase of post-closure care is calculated by multiplying the most recent annual post-closure cost estimate for each phase of post-closure care by the number of years in that phase. The sum of these two estimates is the amount of financial assurance required for post-closure care. This approach is similar to the Subtitle C calculation of the post-closure care cost estimate, in which the cost estimate is determined by multiplying the annual post-closure cost estimate by the number of years of post-closure care.

EPA is proposing in § 258.32(h) to require corrective action financial assurance for known releases in an amount equal to the most recent annual corrective action cost estimate in § 258.32(d) times the number of years required to complete the corrective action program. The Agency is proposing that financial assurance for corrective action be demonstrated after the cost estimate has been prepared in accordance with § 258.32(d), consistent with Subtitle C. Before adopting this timing requirement, the Agency considered the feasibility of requiring some minimal level of financial responsibility for corrective action as soon as the need for corrective action was demonstrated but before the corrective action measures and costs were determined. This latter approach has been proposed for Subtitle I because the statute requires financial assurance for corrective action for a specified amount ($1 million) before there is any known contamination. The Agency concluded, however, that it still does not have the data sufficient to estimate the cost of corrective action in advance and is delaying the requirement until a release has been detected and the estimates of costs have been developed. States may wish to require some level of financial assurance to cover the costs of interim measures that may be taken prior to the completion of the corrective action plan and the approved cost estimate.

Release from financial assurance requirements for closure, post-closure care, and corrective action is triggered by State approval of the certifications submitted to the State under §§ 258.30(e), 258.31(f), and 258.32(h). Following the receipt of the certification from the owner or operator that verifies that closure, post-closure care, or corrective action have been completed in accordance with the approved plans, today's rule proposes in § 258.32 (f), (g), and (h) that the State notify the owner or operator in writing that he no longer is required to demonstrate financial responsibility for these activities. If the State has reason to believe that the activities have not been conducted in accordance with the approved plan, it must notify the owner or operator and include a detailed statement of reasons for not releasing the owner or operator from the financial assurance requirements.

D. Subpart D—Design Criteria

1. Overview of Proposed Standards

a. New Units. Section 258.40(a) of today's proposal would require that new MSWLF units be designed with liner systems, LCS, and final cover systems as necessary to meet the design goal in the aquifer at the waste management unit boundary or an alternative boundary specified by the State. The two key components of this performance standard are the design goal, which is a human health- and environmental-based ground-water risk level, and the point of compliance (POC) in the aquifer (i.e., the waste management unit boundary or an alternative boundary specified by the State). Today's proposal provides States considerable flexibility in establishing both of these key components. As discussed below, the State establishes the design goal within the protective risk range and also may set an alternative boundary as the point of compliance; however, this boundary shall not exceed 150 meters from the waste management unit and shall be located on land owned by the owner or operator of the MSWLF.

In this proposal the Agency is considering three alternative risk ranges. These are 1×10^{-4} to 1×10^{-7}, a fixed level of 1×10^{-5}, or an upper bound risk level of 1×10^{-4} (with States having discretion to be more stringent). EPA is proposing to use the range of 1×10^{-4} to 1×10^{-7} because the Agency currently uses this range in clean-up activities at sites and because this will provide a margin for consideration of site specific factors in setting the risk level. A fixed risk level of 1×10^{-5} would provide a uniform level of protection across all States. On the other hand, setting an upper bond risk level of 1×10^{-4} would allow States greater flexibility in establishing more stringent risk levels based on site specific conditions.

In its regulatory actions EPA generally uses a case-by-case approach, depending on the surrounding issues, uncertainties, and information bases. Such a case-by-case approach allows flexibility in judging the variety of factors and uncertainties included in the risk assessments. For example, the following risk levels have been embraced by EPA since 1984:

- The Superfund Clean-up policy—10^{-4} to 10^{-7}.
- Alternate Concentration Limits (ACLs)—10^{-4} to 10^{-7} with 10^{-6} target.
- Drinking water standards/Maximum Contaminant Level (MCL)—10^{-4} to 10^{-6}.
- Pesticides in groundwater strategy—10^{-6} trigger.
- National Emission Standards for Hazardous Air Pollutants (NESHAPS)—10^{-2} to 10^{-6}.

The Agency intends to examine closely the nature of the Subtitle D universe while keeping in mind the capability of State programs and feasibility of achieving lower risks. The Agency requests comment on these alternatives.

The design goal is an overall ground-water carcinogenic risk level that must be established by the State. At a minimum, the goal must lie within the protective risk range; however, the States would, under any option, have the discretion to select a risk level that is more protective than the proposal. The focus for the design goal is on carcinogenic risk. Results of EPA's Subtitle D risk model indicate that carcinogens drive the risks posed by releases to ground water by MSWLFs. Non-carcinogens, along with carcinogens, will be addressed by the ground-water monitoring and corrective action programs.

The design goal is consistent with the requirements proposed today for determining the ground-water trigger levels (see proposed 258.52) and the ground-water protection standards (GWPSs) (see proposed 258.57(e)). However, unlike the trigger levels and the GWPSs, the design goal is not constituent-specific. Rather, the design goal represents the overall ground-water risk level (i.e., the combined risk from all constituents) that the State believes is necessary to protect human health and the environment.

The possible use of the risk range for a design goal is meant to give the States the flexibility to consider the practicable capability of the owner or operator in establishing design requirements.

The design goal (in conjunction with the point of compliance) is used to determine what design is necessary for the facility. For example, if 1×10^{-5} were chosen by the State as the design goal, the facility must be designed to prevent releases to the ground water that would cause the overall risk posed by the ground water to exceed 1×10^{-5} at the waste management unit boundary or alternative State-specified boundary.

Section 258.40(d) specifies that the State could establish an alternative boundary as the compliance point for a new unit; however, this alternative boundary cannot go beyond the 150 meters from the waste management unit boundary and must be on land owned by the owner or operator of the MSWLF. The State must consider at least the following factors in establishing this alternative boundary: (1) The hydrogeologic characteristics of the facility and surrounding land; (2) volume and physical and chemical characteristics of the leachate; (3) the quantity, quality, and direction of ground-water flow; (4) the proximity and withdrawal rate of the ground-water users; (5) availability of alternative drinking water supplies; (6) the existing quality of the ground water, including other sources of contamination and their cumulative impacts on the ground water; and (7) public health, safety, and welfare effects. EPA's intent in allowing States to establish alternative boundaries is to allow site-specific characteristics to be considered in meeting the design goal. For example, the State may wish to set an alternative boundary in situations where the aquifer is of low quality and has little or no potential for future use.

In considering the various factors specified in § 258.40(d) for establishing this alternative boundary, States will determine which factors are the most important at each facility and are provided the flexibility to use a different ranking system at each facility. The consideration of these site-specific factors should ensure that establishing the alternative boundary would not result in contamination of ground water needed or used for human consumption that would result in adverse impacts on human health or the environment. Such adverse impacts include contamination of drinking water supplies, degradation of sensitive ecosystems, or degradation of recreational areas.

EPA considered setting the maximum alternative boundary at the property boundary without a distance limit. However, under such an approach, great expanses of ground water could be contaminated before detection. EPA believes that this practice would, in effect, circumvent the intent of today's proposal. EPA chose a distance of 150 meters as the maximum alternative boundary to allow for consideration of the practicable capability of owners and operators and to allow for greater State flexibility in setting design requirements. The 150-meter limit also is expected to have minimum impact on existing facilities. The 150-meter value represents the third quartile (75th percentile) from the distribution of distances between the unit and property boundary for MSWLFs determined from EPA's facility survey results (Ref. 30). EPA also is proposing to require that the alternative boundary be located on land owned by the owner or operator of the MSWLF to prevent contamination of ground water off-site.

The consequence of giving States the flexibility to use a POC at a distance greater than the unit boundary is that it allows contaminant concentrations to diminish (due to degradation, dispersion, and attenuation) over distance and, thus, potentially decrease the stringency of design criteria needed to meet the design goal. In this manner, the alternative boundary provides States the opportunity to take into account the practicable capability of the facility owners or operators. For example, EPA estimates (based on risk modeling described later) that the percentage of new MSWLFs exceeding a 1×10^{-5} risk level drops from 43 percent at the unit boundary to 23 percent at 150 meters.

For the above reasons, EPA believes the 150-meter maximum alternative POC allows for consideration of the practicable capability of the regulated community and State flexibility in setting design criteria while ensuring protection of human health and the environment. The Agency requests comment specifically on the use of this distance to establish an alternative boundary.

In implementing today's proposed performance standard under § 258.40(a), States have two options. Under the first option, the State may establish a performance standard (including the design goal and point of compliance within the limits prescribed in § 258.40(a)) for each facility on a case-by-case basis. For example, after considering site-specific factors, the State may set a performance standard for one MSWLF that specifies a design goal of 1×10^{-5} risk to be met at the waste management unit boundary, while at another MSWLF, the State may require a design goal of 1×10^{-6} to be met at an alternative boundary. In setting this alternative boundary, the State must fully consider the factors specified in § 258.40(d).

Under the second option, a State may establish one performance standard (including the design goal and point of compliance) that applies to all MSWLFs in the State. For example, the State may elect to establish a performance standard that requires all new MSWLFs in the State to be designed to meet a risk level of 1×10^{-6} at the waste management unit boundary. If a State wishes to incorporate an alternative boundary (i.e., other than the waste management unit) into its State-wide performance standard, the State must carefully consider all the facility-specific factors required under § 258.40(d). The Agency believes that this method may be difficult in States that have a large number of MSWLFs.

Regardless of whether the performance standard is set on a site-specific basis or a State-wide basis, the State must still determine MSWLF designs that meet the performance standard. Section 258.40(d) requires the State to consider at least the following factors in determining the specific design necessary to meet the performance standard: (1) The hydrogeologic characteristics of the facility and surrounding land, (2) the climatic factors of the area, (3) the volume and physical characteristics of the leachate, (4) proximity of ground-water users, and (5) ground-water quality. Various methods for considering these factors and determining appropriate designs are discussed later in this preamble (see Part 5 of this section).

In certain cases, the State may find that MSWLF designs required under its existing regulations adequately meet a State-wide performance standard established in accordance with Subpart D of today's proposal. In such cases, the State may use its existing regulations to implement today's proposed requirements for new MSWLF design. The Agency specifically requests comments on the approach to State implementation of today's proposed § 258.40(a) performance standard.

b. Existing Units. The Agency is proposing a different performance standard for existing units than for new units. For existing units, § 258.40(e) of today's proposal would require installation of a final cover system that prevents infiltration of liquids through the cover and into the waste. In proposing a different standard for existing units, the Agency is taking into account the practicable capability of owners and operators of MSWLFs. EPA recognizes that most existing units have not been specifically designed to meet the design goal at the waste management unit boundary. However, some States have design and performance requirements for MSWLFs that, if properly implemented, may have resulted in landfill designs that are capable of meeting the design goal for new units. Further, MSWLFs constructed after the promulgation of the 1979 Criteria (40 CFR Part 257) should have been designed and operated to ensure that the concentration of contaminants introduced to the ground water did not exceed the MCLs specified in the Part 257.

EPA believes that to require existing units to meet the same performance standard as new units would seriously strain the resources of the regulated community. First, the data necessary to make the determination of whether the existing unit meets the design goal, such as the geology beneath the unit or the original design specifications, may not be readily available or may be very costly to obtain. This lack of information was evident in several of the case studies EPA reviewed in developing of this proposal. Second, if the design of the existing unit was determined to be incapable of meeting the design goal, retrofitting would be necessary. The Agency believes retrofitting for Subtitle D facilities should not be required because (1) the procedure is impractical because it requires the excavation and temporary storage or disposal of wastes, (2) the excavation of the waste may create its own set of public health problems (e.g., dangers to workers, contaminated run-off), and (3) such retrofitting would disrupt existing solid waste management activities. Retrofitting may be particularly disruptive if a large number of existing facilities are found to be unable to meet the design goal.

The final cover requirement for existing units could be met by a wide range of designs based on site-specific conditions. These designs range from a cap consisting of soils with adequate moisture-holding capacity, planted with the proper vegetative cover to handle the wettest month at this location and sloped to maximize surface run-off without causing significant erosion problems, to a cap containing a hydraulic barrier, such as a flexible membrane liner to prevent infiltration into the waste.

As with new units, many factors are involved in designing the final cover. These include precipitation, potential and actual evapotranspiration soil moisture holding capacity, vegetation, and run-off. There are several methodologies available that use these factors to estimate the amount of infiltration that may enter the waste. These methods are discussed in the background documents that support today's rule (Ref. 5).

2. Rationale for Proposed Approach

The primary goals of this rule are to establish standards that are protective of human health and the environment, provide flexibility to the States, and minimize disruption of current solid waste management practices by considering the practicable capability of the regulated community. The Agency believes that a performance standard approach for the design of MSWLF units best ensures that these goals can be achieved.

Today's proposed requirements would allow the owner or operator to take into account site-specific conditions when designing the unit to ensure that the concentration of contaminants at a specified compliance point (e.g., the waste management unit boundary) meets the design goal. Furthermore, use of a performance standard allows for the consideration of innovative technologies that may be developed in the future.

Today's performance standard would also provide States the flexibility to make the final decision as to how the standard would be achieved. Many States currently have standards that utilize a performance standard approach for design of MSWLFs and strongly support the performance standard approach proposed today. The Agency believes that, in many cases, only minor modifications to existing State standards would be necessary to make them consistent with today's proposal. Therefore, EPA believes that the proposed standard allows consideration of practicable capability and will result in minimal disruption to State programs. A review of current State regulations is included in background documents supporting this proposal (Ref. 9).

a. Differences from Existing Part 257 Criteria. Today's proposed standard for MSWLFs is similar to the current requirements under 40 CFR 257.3–4, which prohibits Subtitle D facilities from contaminating ground water beyond the solid waste boundary or an alternative boundary specified by the State. There are, however, several major differences in today's proposal.

First, today's proposal specifically would require the owner or operator to design new units to meet a protective ground water risk level. (See discussion in Section IX.D.1.a. of today's preamble concerning the design goal and EPA's request for comment on alternative risk ranges.) Under the existing Criteria, if a facility contaminates the ground water, the facility is classified as an "open dump" and must be upgraded or closed under a State-approved compliance schedule. Today's proposal, by establishing a design goal tied to ground-water protection, is intended to be preventive rather than reactive.

Second, the proposed design goal is an overall risk level that encompasses risks from a comprehensive set of constituents (i.e., Appendix II), which form the basis of the ground-water protection standard. The standard for the existing Criteria is limited to the contaminants identified in the National Interim Primary Drinking Water Regulations (NIPDWRs), now National Primary Drinking Water Regulations (NPDWRs). The Agency recognized in the preamble when it promulgated the existing Part 257 Criteria that this list did not serve as a comprehensive ground-water quality standard because it did not include all potentially harmful substances that might be associated with leachate from solid waste. Today's proposal requires that an overall risk level (i.e., design goal) be selected and used in new unit design and that, during ground-water monitoring, a more comprehensive list of constituents (i.e., more comprehensive than the existing Part 257 Criteria) be used to ensure that the design goal is being met. This list includes many constituents that may be found in landfill leachate, thereby providing more protection to human health and the environment than the existing Criteria. This proposal is discussed in greater detail in Section IX.E of today's preamble.

Third, EPA is proposing to establish a maximum limit on the distance the alternative boundary may be from the waste management unit boundary. Under the original Criteria, the maximum limit for the alternative boundary was left to the State's discretion. The Agency has chosen to propose a limit of 150 meters from the unit boundary in establishing the alternative boundary. The site-specific factors to be used in establishing an alternative boundary that were identified in the original Criteria, however, have been maintained.

Fourth, today's action proposes ground-water monitoring and corrective action requirements for both new and existing municipal waste landfills. The monitoring requirements would allow continuous evaluation of whether facilities are complying with the design goal, while the corrective action requirements ensure that appropriate responses are taken to protect public health from exposure to contaminated ground water and minimize resource damage.

Finally, today's action proposes different design standards for new and existing MSWLF units, unlike the original Criteria, which established one design standard for both types of units. EPA made this decision for the reasons discussed earlier (e.g., practicable capability); however, when this different standard for existing units is considered in context with other requirements of the proposal (e.g., corrective action), the overall protection is the same.

b. Differences From Subtitle C Standard. There are two major differences between the current Subtitle C standards for hazardous waste landfills and today's proposal. First, the overall performance standard for the design of hazardous waste landfills is more stringent than the performance standard for MSWLFs. Subtitle C landfills must be designed to prevent hazardous waste or hazardous constituents from entering the surrounding soils and ground water. The proposed performance standard for MSWLFs, which would require that the design goal not be exceeded at the compliance point, allows the mitigating effects of the surrounding soils and aquifer material to reduce the concentrations of contaminants. The Agency believes today's standard is appropriate for MSWLFs because it allows for consideration of the practicable capability of the regulated community.

The second major difference between toady's proposal and the current Subtitle C standards is the strict Subtitle C design standard. Although there are certain very stringent variances available, location characteristics (e.g., climate and hydrogeology) generally do not reduce the design requirements for Subtitle C facilities as they do under the Subtitle D proposal. Therefore, Subtitle C specifies one design (i.e., double liners, LCSs, and leak detection systems) for almost all locations, while the proposed Subtitle D performance standard would allow location characteristics to be considered when designing the MSWLF unit so that the location and design of the unit complement each other. This proposed standard would allow consideration of the practicable capability of the owner or operator.

3. Alternatives Considered

The Agency considered a number of alternatives to the design requirements proposed today. Various performance standards, uniform design standards (with and without variance provisions), location categories approach, and risk-based approach were considered in developing today's design requirements. The Agency requests comments on all the alternatives presented below. EPA specifically is interested in comments on the advantages and disadvantages of the alternatives in relation to today's proposed approach.

a. Other Performance Standards. EPA considered two alternative performance standards to those contained in today's proposal: (1) Require MSWLFs to be designed to meet the design goal at the unit boundary but make no allowance for an alternative boundary and (2) require MSWLFs to be designed to meet the design goal at the unit boundary or any alternative boundary specified by the State (current standard in 40 CFR Part 257). These alternatives were evaluated based on the potential extent of ground-water contamination that may result, ability to enforce the standard through citizen suits, the practicable capability for the regulated community to comply, and flexibility afforded the States.

The first alternative, requiring MSWLFs to meet the design goal at the unit boundary, would provide the greatest protection to ground water because, by strictly defining the point of compliance as the unit boundary with no alternative allowed, it limits the real extent of ground-water contamination.

This alternative could be enforced easily through citizen suits; however, this option does not allow consideration of the practicable capabilities of the regulated community and could limit State flexibility by not allowing States to consider site-specific conditions when determining the point of compliance. Further, by not allowing consideration of site-specific conditions, this alternative could result in over-regulation and could exceed the practicable capability of the regulated community to comply.

The second alternative, requiring MSWLFs to meet the design goal at the unit boundary or a State-selected alternative, would provide more flexibility to account for the practical capability of the regulated community. It would be less burdensome to the regulated community because site-specific factors could be considered, thereby avoiding over-regulation and increased costs; however, it would be less protective of ground water because it would allow for a greater area extent of ground water to be contaminated than the first alternative. This alternative also could be difficult to enforce through citizen suits because no one alternative boundary would be specified in the rule for all MSWLFs.

The Agency believes that today's proposal provides a balance of the positive aspects of the above alternatives. It limits the potential area extent of ground-water contamination by placing a distance cap on the alternative boundary. In addition, it provides State flexibility, minimizes the potential for over-regulation, and considers the practicable capability of the regulated community. Finally, it would be enforceable at the Federal level or through citizen suits because it would set limits at the point of compliance.

b. Uniform Design Standards. The Agency also considered establishing uniform design standards for MSWLFs. Under this approach, requirements for liners, LCSs, and final cover systems would have been delineated in the regulation and would have been the same for all units. This approach is the same as that used in the Subtitle C regulations. This approach can simplify permitting because the same specific design requirement applies to all units regardless of site-specific differences. The Agency rejected this type of standard for MSWLFs because it would not consider site-specific location factors nor the practicable capability of the regulated community to comply, resulting in possible over-regulation in some areas. Further, it would severely limit State flexibility.

The Agency also considered uniform design standards with variances to allow variation of designs based on site-specific factors. In particular, the Agency considered proposing for all new MSWLFs composite liner and leachate collection system requirements similar to those proposed today only for those MSWLFs that recirculate leachate or gas condensate. As stated previously, the composite liner system would consist of a flexible membrane liner as the upper component and a compacted soil layer as the lower component. The soil layer would be at least three-feet thick with a hydraulic conductivity of no more than 1×10^{-7} cm/sec. The leachate collection system would need to be constructed to maintain less than a 30-cm depth of leachate over the liner. A variance mechanism would be provided to allow use of alternative designs based on site-specific considerations. These variances would be based on the hydrogeological characteristics of the landfill, alternative operating methods, the resource value of ground water, the nature of the alternative design, and other factors. The combination of these factors would have to provide a level of environmental protection equal to the standard design.

The Agency recognizes that this approach would likely be easier to implement and enforce and may provide greater assurance of protection of human health and the environment than other options considered; EPA is not proposing this approach because of concern regarding the difficulty in granting variances and the resulting potential over-regulation of some facilities. The Agency also is concerned that this approach would limit the States' ability to adequately consider the practicable capability of the regulated community.

c. Risk-Based Algorithm. The use of a risk-based algorithm is based on the development of a predictive equation that can be used to determine, on a site-specific basis, the potential human health risks from a proposed landfill. Such an approach could be simple to implement and could incorporate a large number of site-specific factors; however, the development of a valid predictive equation is difficult and its reliability would be limited by the quality of data employed in it. Furthermore, one equation may not be appropriate for all site-specific situations.

d. Categorical Approach. Another alternative considered by EPA, which is described in detail in the next section of this preamble, is an approach that would categorize locations based on hydrogeologic and climatic conditions. Specific designs would be identified for each category, and methods for categorizing locations and their corresponding requirements would be specified. This approach would be relatively easy to implement and would allow the consideration of site-specific conditions. The approach allows the consideration of climatic factors and geologic conditions, but no aquifer characteristics and ground-water resource value. Also, this approach might not adequately account for the practicable capability of the regulated facilities to comply. In addition, this approach would restrict State flexibility by prescribing a methodology States would use in establishing design requirements for various locations. While EPA has not proposed this approach today, EPA also is presenting this approach, along with the risk algorithm, as possible methods for determining adequate designs for meeting the performance standard proposed in § 258.40(a).

The Agency recognizes that the choice of a particular type of standard is a very controversial decision and is interested in obtaining public comment on today's selection. The selection was based on an attempt to balance several factors including the practicable capability of the regulated community to comply, States flexibility in implementing Subtitle D regulatory programs, and Federal or citizen suit enforceability. Commentors may wish to consider additional factors when providing comment and/or submit other factors for EPA's consideration.

4. Implementation of Performance Standard for New Units

Today's proposal would require that new MSWLF units be designed with liners, LCSs, and final cover systems as necessary to meet the performance standard described above. The specific type of design needed would vary depending on the characteristics of the particular location. In some settings, comprehensive liners and LCSs would be needed, whereas in other settings, minimal engineering controls may be needed. This section provides a brief background on engineering controls and describes various methods for determining the landfill design necessary to achieve today's proposed performance standard.

a. Overview of Engineering Controls. The purpose of lining an MSWLF unit is to prevent leachate from seeping from the site and entering the aquifer. A liner is a hydraulic barrier that prevents or greatly restricts migration of liquids, thus allowing leachate to be removed from the unit by the LCS. Liners function by two mechanisms: (1) They impede the flow of leachates into the subsoil and to the aquifer and (2) they adsorb or attenuate pollutants thus retarding the migration of contaminants. This adsorptive or attenuating capability is dependent largely upon the chemical compositions of the liner material and its mass. Most liner materials function by both mechanisms but to different degrees depending on the type of liner material and the nature of the liquid to be contained. Liners may be grouped into two major types: synthetic (flexible membrane liners) and natural (soil or clay liners).

Flexible membrane liners are the least permeable of the liner materials, but have little capacity to attenuate dissolved pollutants. Natural liners can have a large capacity to attenuate materials of different types, but they are considerably more permeable than the FMLs. Both types of liner materials can prevent or limit leachate migration out of the MSWLF.

A review of the MSWLF case studies identified various types of liners currently being used, including compacted native and imported soils, compacted mixtures of native soils and bentonite, and FMLs. The liner designs used varied somewhat from region to region.

In landfills designed with liners, a leachate collection and removal system is necessary to relieve the hydraulic pressure within the landfill. Without a collection and removal system, the leachate will accumulate, increasing the driving force for migration through the base of the fill. Leachate could eventually back up into the unit (i.e., the "bathtub" effect), resulting in seepage near the surface and possibly affecting surface waters or other receptors. Collection systems also may be needed when a landfill is located in saturated soils. Water from this saturated material eventually will seep into the waste and generate leachate if not removed by an LCS.

The collection and removal of leachate from the unit will assist in meeting the overall performance goal for the unit. An LCS generally consists of perforated drain pipe installed in gravel-filled trenches above the liner at the base of the unit. The collection system is drained by gravity to a sump or series of sumps from which the leachate is withdrawn for treatment or disposal. Additional details on the design and construction of LCSs can be found in "Lining of Waste Impoundment and Disposal Facilities" (Ref. 36).

The Agency believes that placement of a final cover over closed portions of an MSWLF is necessary to: (1) Minimize infiltration of rainwater; (2) minimize dispersal of wastes by human, animal, or physical interactions; and (3) minimize the need for further maintenance at the facility during the post-closure period and beyond. The types and amounts of cover material needed to accomplish these goals and to achieve compliance with the design goal are highly dependent on the location of the landfill. The amount of infiltration of water into the final cover and any subsequent percolation through the waste can be affected by surface conditions such as soil type, soil thickness, final grade, type of vegetation, and climatic factors such as amount of precipitation, temperature, and evapotranspiration. For example, in areas with limited rainfall and high evapotranspiration, minimizing infiltration may be achieved by: (1) Grading the unit in such a way as to promote run-off, (2) using the proper type and thickness of soil to maximize moisture-holding capacity, and (3) establishing vegetation to promote plant transpiration of water. In areas of high rainfall and low evapotranspiration, these design factors may not substantially reduce the amount of water entering the waste after closure. In such cases, additional design factors, such as hydraulic barriers, either synthetic or compacted soils, and/or drainage layers, may be required in the final cover to reduce infiltration to acceptable levels. Further information on the design of cover systems is available in a background document (Ref. 5).

b. Methods for Evaluating Designs. Today's proposal does not prescribe a single method for designing a facility to meet the performance standard. Because the Subtitle D program is implemented by the States, the Agency believes that the appropriate method for implementing the design performance standard is best determined by the States; however, EPA is providing guidance on three methods for determining what design is necessary to comply with the performance standard (i.e., to meet the design goal at the point of compliance). These methods include: (1) A risk-based algorithm, (2) a categorical approach, and (3) an empirical method. A fourth method not discussed involves using a State-selected risk model. Although this last method is not described, the data needed and assumptions made for the risk-based algorithm may be similar to what would be necessary for the State-selected risk model.

For the risk-based algorithm (and the State-selected risk model), the design goal is expressed as a risk level. The risk level selected as the design goal is not directly involved in applying the categorical approach but is used to determine compliance and to establish clean-up levels for corrective action. The categorical approach presented today is based on preventing any leachate from migrating to the aquifer. Because of this no-migration concept, this approach is generally more conservative than the risk-based algorithm and in some cases would require more extensive engineering controls than would be determined from the risk-based algorithm.

The empirical methodology uses historical ground-water monitoring data to assess the effectiveness of existing designs in meeting the design goal. The ground-water monitoring data would be used to calculate a risk level that would be compared to the design goal.

These three methods are described below and in more detail in the background document on facility design (Ref. 5). EPA plans to issue a guidance document addressing facility design after the final rule is promulgated.

(1) Risk-Based Algorithm. Using the Subtitle D Risk Model, EPA derived an algorithm that characterizes a site's potential for ground-water contamination. This algorithm uses information on a facility's potential leachate release rate and the characteristics of the site's hydrogeology to estimate the level of ground-water contamination that would result from an MSWLF operating at that site. The level of contamination is represented in the algorithm by the excess lifetime cancer risk associated with human consumption of ground water at the landfill's compliance point. States and landfill owners or operators can use this algorithm as a screening tool to determine whether a new MSWLF at a given site is likely to achieve compliance with the State-established design goal if constructed with no bottom liner and a vegetative cover. The risk-based algorithm cannot be used to analyze the reduction in human health risks that would be achieved through the use of more stringent control technologies.

The steps involved in using the risk-based algorithm are displayed in Figure 1. The State would establish the design goal that is tied to the trigger levels for hazardous constituents specified in § 258.56 for the landfill. If the calculated risk is lower than the design goal, this would imply that the proposed landfill would be in compliance with the performance standard. If the calculated risk exceeds the design goal, the owner or operator could choose a new site for the landfill, change the proposed dimensions of the landfill, or employ more stringent control systems (e.g., bottom liners, leachate collection systems, different cover types). The effects of changes in location on risk potential could be calculated using the risk-based algorithm, while the effects of more stringent containment and cover systems could not. EPA recommends that a more rigorous State-selected assessment (either risk- or technology-based) be used to specify the mix of containment and cover system components capable of meeting the design goal.

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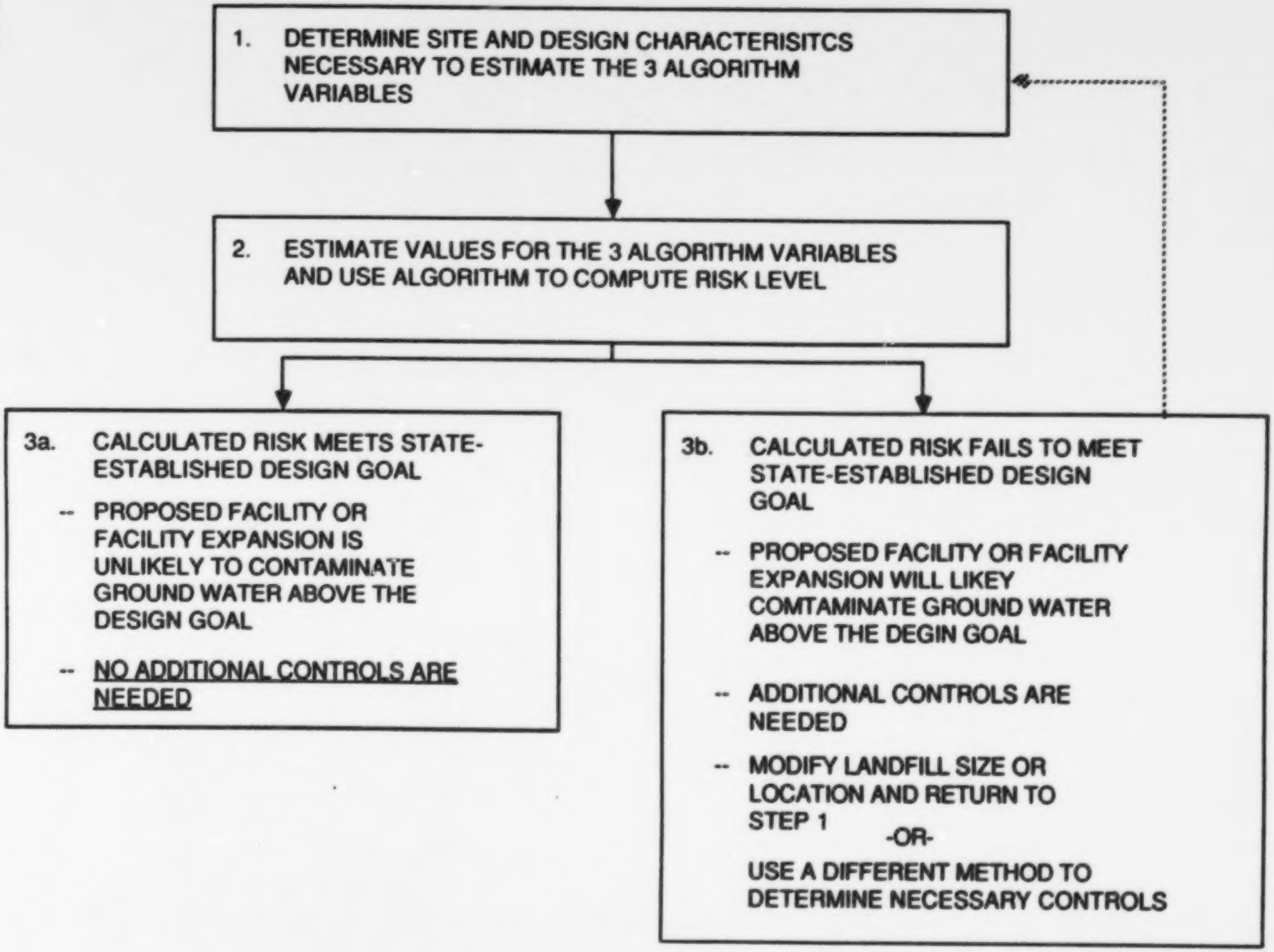
FIGURE 1

APPLICATION OF RISK-BASED ALGORITHM



1. DETERMINE SITE AND DESIGN CHARACTERISITCS NECESSARY TO ESTIMATE THE 3 ALGORITHM VARIABLES

2. ESTIMATE VALUES FOR THE 3 ALGORITHM VARIABLES AND USE ALGORITHM TO COMPUTE RISK LEVEL

3a. CALCULATED RISK MEETS STATE-ESTABLISHED DESIGN GOAL

- -- PROPOSED FACILITY OR FACILITY EXPANSION IS UNLIKELY TO CONTAMINATE GROUND WATER ABOVE THE DESIGN GOAL
- -- NO ADDITIONAL CONTROLS ARE NEEDED

3b. CALCULATED RISK FAILS TO MEET STATE-ESTABLISHED DESIGN GOAL

- -- PROPOSED FACILITY OR FACILITY EXPANSION WILL LIKEY COMTAMINATE GROUND WATER ABOVE THE DEGIN GOAL
- -- ADDITIONAL CONTROLS ARE NEEDED
- -- MODIFY LANDFILL SIZE OR LOCATION AND RETURN TO STEP 1

-OR-

USE A DIFFERENT METHOD TO DETERMINE NECESSARY CONTROLS

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The risk-based algorithm is as follows:

$R=4.5 * 10^{-4} * (Q_R/Q_A) * e^{(TOT)(-0.028}$

where:

R = lifetime risk posed by consumption of ground water at designated compliance point.

Q_R = predicted leachate release rate to the uppermost aquifer, m^3/yr.

Q_A = ground-water flow rate for the uppermost aquifer, m^3/yr.

TOT = time-of-travel for leachate in this aquifer from the unit boundary to the compliance point, years (TOT = 0 for unit boundary compliance point).

In essence, the risk-based algorithm states that the risk associated with ground-water contamination from an MSWLF is a function of the rate of leachate release from the site and the attenuation (i.e., dispersion and degradation) of this leachate in the aquifer. Q_R represents the annual leachate release rate, while Q_A and TOT account for the dilution, dispersion and degradation of contaminants in ground water. Methods for calculating Q_R, Q_A, and TOT are described later.

EPA acknowledges several limitations of this approach. First, this approach is dervied by assuming that the MSWLF risk results produced by the Subtitle D Risk Model represent "true" risks and fitting a simplified mathematical model (i.e., the risk-based algorithm) to these results. The Subtitle D Risk Model is currently unverified for predicting ground-water contamination resulting from MSWLFs. However, EPA believes the model is technically correct and believes that it can adequately characterize the risk from MSWLFs.

Second, the approach assumes that the leachate produced from a particular landfill will have a composition and constituent concentrations similar to that used in the Subtitle D Risk Model. The initial leachate constituent concentrations used in the model represent the median concentrations for six constituents found in samples of leachate from numerous MSWLFs (see Section XI of preamble). (A complete discussion of the leachate constituent selection process, including the dose-response parameters used for the constituents, is contained in the draft Regulatory Impact Analysis.) The risk-based algorithm should not be used for proposed MSWLFs that have expected leachate characteristics substantially different from those used in the Subtitle D Risk Model. EPA recommends that, at these landfills, a State-selected Risk Model or other approach be used.

Third, the risk-based algorithm never predicts risks higher than 4.5×10^{-4}. This value was derived from the Subtitle D Risk Model results for approximately 500 distinct combinations of landfill size, environmental and hydrogeologic setting, and exposure distance. In about 5 percent of these scenarios, the modeled risks were higher, although none exceeded 10^{-3}.

Fourth, although the risk-based algorithm is relatively powerful in a statistical sense (i.e., its predicted risks correlate well to the Subtitle D Risk Model's predicted risks), its use introduces some additional uncertainty.

The State might account for some of the uncertainty in the approach by setting the risk-based algorithm goal somewhat lower than the actual design goal. For instance, if the State determines that the actual design goal should be 1×10^{-4}, it could state that any MSWLF with calculated risks exceeding 1×10^{-5} would be required to perform a more detailed site-specific assessment. Such a margin of safety (in this example, one order-of-magnitude) would allow the States and owners and operators to identify low-risk MSWLFs relatively quickly and focus more effort on borderline or high-risk MSWLFs. EPA recommends that the States determine the acceptable margin of safety between the risk-based algorithm-predicted risk and the design goal.

Fifth, the risk-based algorithm does not apply to sites with complex hydrogeology. The ground-water concentrations in sites characterized by fractured, folded, or faulted rock, karst terrain, tidally-induced changes in ground-water flow, or similar complex conditions are not represented in the underlying Subtitle D Risk Model, and thus the risk-based algorithm does not predict them. In these conditions, EPA recommends more sophisticated analytical techniques be used.

Sixth, characterizing the variables needed to solve the algorithm for an individual site may be both costly and difficult. However, some simple methods are available to make these determinations, as discussed later.

These limitations thus relate to the ease of implementation and the uncertainty embodied in the approach. EPA has attempted to propose the risk-based algorithm in a form that strikes a reasonable balance between the desire for accuracy and certainty on the one hand, and timely, moderate-cost implementation on the other.

In order to develop the risk-based algorithm, the Agency identified from case studies, damage cases, field observation, Subtitle D risk modeling results, and other sources several environmental factors that affect leachate generation, leachate release, migration, exposure, and risk. These factors include landfill size, net infiltration, subgrade permeability, depth to ground water, aquifer flow rate, and time-of-travel from the unit to a potential exposure point. Using the list of key environmental factors, EPA conducted an analysis of variance (ANOVA) and a regression analysis. The ANOVA allowed EPA to determine the importance of each of the environmental variables in explaining the variation in the predicted MSWLF's risk. The regression analysis, coupled with an understanding of the physiochemical processes that affect risk, allowed EPA to establish a simple equation, using the key environmental variables identified in the ANOVA, to predict a facility's risk.

For the purpose of the ANOVA and regression analysis, EPA used the risks predicted from the Subtitle D Risk Model. For this application, the model simulated approximately 500 exposure scenarios comprising unique combinations of infiltration rates, facility size, depth to water table, hydrogeologic conditions (aquifer velocity and configuration), and exposure point. For each scenario, EPA predicted the highest lifetime health risk that would be experienced over a 300-year simulation period.

In establishing the importance of the environmental variables, the Agency generated a series of ANOVA tables displaying the relationship between the identified (independent) environmental variables and risk, the dependent variable. The ANOVA tables provided EPA with a means to evaluate the strength of the association between risk and the various independent variables.

The ANOVA results indicated that none of the environmental variables alone explains more than 10 percent of the variability in risk. EPA then combined some of the related variables to test the relationship between risk and three "top" parameters: leachate flux (Q_R), aquifer flux (Q_A), and TOT. Q_R is a function of several variables including the facility size, the infiltration rate, and the subgrade permeability. Q_A is a function of the aquifer velocity (i.e., permeability and hydraulic gradient), aquifer thickness, and effective porosity. It accounts for the dilution and attenuative capacity of the aquifer, and is measured at the downradient point of compliance. TOT is a function of the aquifer velocity and distance to the downgradient compliance point. Using these "top" parameters, EPA analyzed several forms of the equation used to predict MSWLF risks.

As with most regression equations, the chosen algorithm omits some independent variables that could increase the explanatory power of the model; however, EPA believes that it is better to use fewer variables and keep the classification scheme simple. EPA believes that the relationship is conceptually valid and realistically depicts the actual physical relationships between these parameters.

To apply the risk-based algorithm at a given site, the owner or operator must calculate three variables: leachate flux (Qr), aquifer flux (Qa), and ground-water TOT. Several methods exist for calculating TOT, Q_A, and Q_R. TOT equals the distance between the landfill unit boundary and the compliance point; this distance is then divided by the ground-water velocity. Thus, TOT will equal zero whenever a unit boundary compliance point is selected. Calculation of ground-water velocity requires either field measurement or obtaining estimates of hydraulic conductivity, hydraulic gradient, and effective porosity from available literature. Ground-water velocity equals KI/n, where K is the hydraulic conductivity, I is the hydraulic gradient, and n is the effective porosity.

Q_A also can be determined either by field measurement or by empirical calculation. Q_A equals KIA, where K is the hydraulic conductivity, I is the hydraulic gradient, and A is the cross-sectional are of the aquifer.

Q_R can be calculated as the product of the surface area of the MSWLF and the annual recharge. The surface area of the landfill can be taken from site maps and plans. Recharge can be estimated either empirically or through use of a water balance method. EPA recognizes that this approach of calculating Q_R does not account for the potential effects of low-permeability wastes or subgrades in limiting the rate at which leachate can be released from a landfill. In most cases, the leachate release rate will be limited by the recharge rather than the permeability of the waste or the subgrade.

EPA realizes that the cost of estimating values for some of these variables can be high, depending on the method used. EPA believes, however, that at least some of these costs would be incurred independently of the use of the algorithm (e.g., hydrogeologic studies).

EPA requests comments on this approach, particularly on the utility of the approach; the difficulty in implementing it; the leachate characterization; environmental transport; the technical accuracy of the risk-based algorithm; and methods for addressing the uncertainty inherent throughout the risk assessment that is the conceptual foundation for this approach.

(2) Categorical Approach. The categorical approach is an engineering approach for determining whether a facility will meet the performance standard and is based on the ability to match location characteristics to specific design requirements. The intent is to present a simplified methodology that accounts for liquid migration in the overburden (the material between the bottom of the unit and the top of the aquifer). The categorical approach is designed to achieve minimal releases to the aquifer, which is somewhat more stringent than the performance goal proposed today (i.e., meet design goal at unit boundary or alternative boundary). A relative comparison of the (estimated) necessary designs, costs, and benefits of the categorical approach to the proposal is contained in the draft Regulatory Impact Analysis.

The approach uses two basic elements. First, the design selected for use during the active life, takes into account local hydrogeologic and climatic conditions to prevent liquids from reaching the aquifer. Second, at closure, a final cover system is used that minimizes the generation of leachate by preventing the infiltration of liquid into the waste. The Agency recognizes that the final cover will not stop leachate from migrating to the aquifer, but the final cover will minimize the amount of water that moves through the waste into the aquifer. By reducing the amount that enters the aquifer, EPA believes that the performance standard specified in § 258.40(a) can be met because the dilution and attenuation that occurs in the aquifer will reduce the concentrations of the small amounts of contaminants that escape the landfill.

Because the categorical approach seeks to minimize constituent releases to aquifers, it is conservative approach to designing facilities to meet today's performance standard. The State and the owner or operator should be aware of this when using this approach to identify designs necessary to meet today's performance standard.

The categorical approach is based on the potential for contaminants in leachate to migrate from the MSWLF. Leachate is formed by rainwater and other liquids percolating through the solid waste in the landfill. Different hydrogeologic and climatic settings influence both the rate at which leachate is generated and the potential for leachate to escape from the unit and eventually reach ground water. Under this approach, location categories are established based on the migration potential of water from the landfill unit. Once the location categories are defined, design requirements are specified to offset the effects of "poor" locational factors to counteract the rapid movement of contaminants from the MSWLF to the aquifer that these "poor" locations promote.

Under this approach, locations are categorized based on the climate and geology, which determine the potential for contaminants to migrate into the aquifer. In developing this approach, climate and geology were evaluated to determine their contribution and importance to the generation and migration of leachate from landfills. Because this approach is based on preventing the migration of leachate to the aquifer during the active life of the unit, aquifer characteristics do not play a role in the selection of design requirements necessary to meet the design standard.

(a) Climatic Factors. The Agency believes that climatic conditions are key factors in determining the rate and amount of leachate that will be generated in an MSWLF unit. The climate of a particular area is dependent upon the interrelationships of numerous conditions. The factors that the Agency evaluated in developing the categorical approach are: Precipitation, potential evaporation, potential evapotranspiration, temperature, and run-off. Each factor is discussed briefly below.

Precipitation normally is expressed as the amount of rainfall and snowfall that occurs at a specific location. Precipitation is the primary climatic factor affecting the generation of leachate at landfills. When precipitation enters a landfill, it infiltrates the wastes and dissolves contaminants to form leachate. As more leachate is formed, hydraulic head is built up at the base of the landfull that acts as a driving force for migration to the subsurface. Both the rate and degree to which this process occurs will vary, based on the location of the MSWLF.

Potential evaporation (PE), measured as pan evaporation, is normally expressed as the amount of water that potentially will evaporate from a free water surface at a specific location. This factor often is similar to lake evaporation and is not representative of MSWLF conditions. Potential evapotranspiration (PET) is normally expressed as the potential amount of water that will evaporate from soil surfaces and transpire through plants at a given area. Normally, PET is lower than PE in a given area. Temperature plays an important role in potential evaporation and potential evapotranspiration for a given location; the values for these factors incorporate the effects of temperature.

Run-off, although not a climatic factor, normally is expressed as the amount of water that will migrate from the site in the form of overland flow. Major land surface conditions affecting surface run-off include topography, cover material, vegetation, soil permeability, antecedent soil moisture, and artificial drainage.

In order to achieve the overall goal of this methodology (preventing leachate from reaching the aquifer during the active life of the unit), it is necessary to determine the factor or factors that best represent the potential amount of moisture available for entering the waste, thereby generating leachate. The Agency evaluated the above factors to determine which factor or factors best characterized the climatic elements relevant to leachate generation. The objective of the evaluation was to determine the potential for leachate generation during the active life of a unit. As stated earlier, the Agency believes that once the MSWLF is properly closed and covered, leachate generation should be minimal. No single factor or combination of factors could be found that adequately characterized climatic elements such that leachate generation during the active life could be estimated. EPA, therefore, selected a simple two-step process that can be used to categorize locations based on climate. This process uses mean annual precipitation as the factor in the first step.

The first step of the process requires that the mean annual precipitation (P) for an area be determined. P was chosen because: (1) It is easily determined, (2) it does not necessarily require the collection of new data, and (3) it conservatively describes the amount of water potentially available for infiltration and leachate generation. Using P conservatively estimates the amount of leachate formed because it does not consider evaporation or run-off. Values of P can be obtained from the National Weather Service, the National Oceanographic and Atmospheric Administration (NOAA), and/or USGS Water Atlases. These sources have collected rainfall data over extended periods of time, so values from these sources should be representative of annual rainfall in an area.

The Agency believes that there is a relationship between precipitation and leachate generation. Based on an evaluation of MSWLFs in different climatic settings, EPA has concluded that areas that receive more than 40 inches or precipitation per year generate leachate in quantities sufficient to warrant collection. Therefore, under the categorical approach, units located in areas that receive more than 40 inches of precipitation annually would be required to have leachate collection. For areas that receive less than 40 inches of precipitation per year, the evaluation indicates that leachate may not always be generated in amounts necessitating collection. Therefore, the second step of the process is to estimate the amount of leachate formed in areas receiving less than 40 inches of precipitation to determine if enough leachate is generated to warrant collection.

This estimate incorporates factors that determine the potential for leachate accumulation at a specific landfill. The factors used include P, PET, actual evapotranspiration, soil moisture holding capacity, waste moisture holding capacity, and run-off. Because MSWLFs are ongoing construction projects, the relationship among these factors relative to leachate accumulation continually changes. Therefore, a demonstration method that evaluates the potential amount of leachate accumulation at different stages of landfill construction is necessary. Under this method, the evaluation would be based on the projected landfill configuration at the end of each operating year. The Agency believes that some facilities in low precipitation locations may be able to eliminate the need for leachate collection by adjusting operational characteristics of the site.

The following steps are needed to determine when an LCS is necessary:

Step 1: Estimate topographic contours of the unit at the end of each operating year throughout the active life until final cover has been installed.

Step 2: Compute the quantity of leachate generated for each year of active life using the water balance method. This step may require dividing the landfill unit into discrete areas to take into account differing grades and variations in surface run-off. If so desired, the moisture-holding capability of soil layers used for cover could be considered. Most active portions of a landfull will have no vegetative cover, so moisture loss by evapotranspiration should not be considered in the water balance calculation. Moisture loss from active portions should be accounted for by using estimates of evaporation from bare soil as described in an EPA guidance document (Ref. 35).

Step 3: Calculate the total accumulation of leachate at the base of the unit by adding the amount of leachate generated to the amount predicted for each previous year.

Step 4: If total accumulation of leachate at the base of the unit (as determined by Step 3) exceeds or equals one foot at any stage of the landfill construction, an LCS is necessary. For example, for a unit that has a three-year active life: for year one, it is estimated that one foot of field capacity of the waste remains and no leachate is generated. For year two, it is determined that one foot of field capacity remains and, again, no leachate is generated. However, for year three, before final cover is installed, it is determined that field capacity for the portion of unit planned to be built that year will be exceeded and four feet of leachate will be generated. Presuming that the year three portion of the unit is on top of the year two and year one portions of the unit, the total effect will be to negate the unused moisture holding capacity of the previous two years and result in a head build-up of two feet at the base of the unit, which is sufficient to require the installation of an LCS. This method is further discussed in the backgound document supporting this proposal (Ref. 5).

(b) Geologic Factors. The nature and extent of the geologic material underlying a given MSWLF site strongly influence the fate of any leachate generated. The categorical approach estimates the effects of various geologic materials based on the time it takes water to move through the material above the aquifer. Because leachate is an aqueous solution EPA believes it is reasonable to model water movement rather than leachate movement in the subsurface. The Agency believes this simplifying assumption is conservative. This simplified approach does not include consideration of the variability of MSWLF leachate over time. Also some factors that retard constituent movement, such as absorption, chemical precipitation, degradation, and attenuation, that can result in slower movement of the constituent than the solute (i.e., water) are not a part of this simplified approach. Therefore, the Agency believes that considering only the rate of liquid movement is a conservative approach.

Certain geologic characteristics control the rate at which leachate will migrate to the aquifer. For the categorical approach, the rate must be determined so that design features can be added when the natural conditions do not give adequate protection to the aquifer. The geologic factors evaluated included the following: Depth, saturated hydraulic conductivity, effective porosity, and linear velocity.

Depth (D) refers to the thickness of the geologic material between the bottom of the unit and the top of the aquifier. This zone is referred to as the overburden. Saturated hydraulic conductivity (Ksat) is a measure of the ability of porous media (soils or rock) to transmit liquids under saturated conditions. Effective porosity (N_e) is a measure of the interconnected pore space in the geologic material. Porosity has a controlling influence on the linear velocity of water in the overburden media. Linear velocity (V) is the speed at which ground water travels in the subsurface under saturated conditions.

Different methodologies were evaluated that could be used to estimate the time for liquids to migrate through the overburden to the aquifier, known as time of travel (T) to the aquifer. The methodologies involve: (1) Calculation of T based on a detailed time-of-travel measurement through the overburden (for saturated and unsaturated geologic material) using the approaches prescribed for determining vulnerable hydrogeology under Subtitle C (Ref. 11), (2) calculation based on Darcy's law, expressed as T=D/Ksat, (3) calculation to T=D/V (based on the linear velocity of water in the overburden with an assumed hydraulic gradient of one), and (4) a wetting front approach for unsaturated soil only.

The detailed time-of-travel analysis results in the most accurate prediction of when leachate may reach the aquifer under ideal conditions; however, it is very data-intensive and complex, particularly for unsaturated conditions. It also requires the development of flow nets.

The second and third methods are more straightforward because the necessary data are readily available from literature and field tests. Because of their simplicity, these methods could be used to pre-screen locations with data available from the literature. These data should be verified by field tests prior to site design because field verification is necessary to ensure that site-specific conditions match conditions predicted by the literature.

D-Ksat is the simpler method to use because it needs only two easily obtained pieces of data: Saturated hydraulic conductivity and depth. Numerous methods are available for determining saturated hydraulic conductivity. For example, in fractured consolidated rock, pressure tests or falling head tests can be used to evaluate Ksat. In unconsolidated materials, constant head gravity tests are commonly used. These and other methods are available and documented. It is important, however, to ensure that the proper methods are used in the material being evaluated. Depth may be obtained easily from a preliminary subsurface exploratory program and/or from boring and drilling logs from surrounding areas.

The third method, D/V, is believed to be more accurate than the second method because the velocity (V) incorporates effective porosity (N_e) in the calculation. As mentioned above, effective porosity is a measure of the interconnected pore space in geologic material. It can be an important controlling influence on hydraulic conductivity (and thus rate of flow) in both unconsolidated and consolidated formations. Porosity values range from 0 to 5 percent for dense crystalline rock, 25 to 40 percent for gravel, and 40 to 70 percent for clay. In fractured rock, secondary porosity also must be considered. When determining the porosity of the overburden at a specific site, both primary and secondary porosity should be considered as warrented.

Although more accurate than D/Ksat, the D/V method has some features that make it less accurate than the detailed time-of-travel calculation discussed earlier. First, it assumes that the hydraulic gradient (a major influence on ground-water velocity) is equal to one. This assumption will result in a conservative time-of-travel value (i.e., the actual time may be longer). Second, it assumed fully saturated conditions, which in most cases will result in a conservative value.

The fourth method involves a wetting front equation and may be a better predictor of flow in the unsaturated zone. The method requires the collection of more data than either the second or third method. This method is based on equations developed for infiltration of water into dry soil and applies simplifying assumptions to calculate the time of travel. The equation used to calculate the time of travel is given as:

T=(LWr)/q

where:

T=time of travel (T).
L=length of the unsaturated zone (L).
Wr=change in moisture content from soil behind the wetting front to dry soil ahead of the wetting front.
q=infiltration rate (L/T).

The length of the unsaturated zone (L) can be determined from boring logs and piezometer measurements. Moisture content behind and ahead of the wetting front can be calculated, and, therefore, Wr can be determined from field measurements or estimated from empirical equations. The infiltration rate is (q) approximated by using the net precipitation.

The principle assumption of this approach is that there exists a distinct and definable wetting front, and that behind the wetting front the soil is uniformly wet and of constant conductivity. The wetting front approach is applicable for a limited range of conditions. In particular, the approach is useful when a constant water flux is applied to initially dry soil. The approach may not be applicable for soils that are initially moist or that are uniform in moisture content under natural infiltration conditions. The principle value of the approach is in predicting unsaturated flow.

The Agency believes that the D/V method of calculating T is conservative and easy to calculate. The categorical approach assumes saturated flow because the available methodologies that can be used to estimate the flow time of water through unsaturated materials are complex and require extensive data collection. Calculating the time of flow for saturated materials involves less complex equations and requires fewer resources to obtain the required data inputs. Furthermore, the use of saturated conditions is generally conservative in predicting time-of-travel in the overburden because, for the most part, K values increase as soil moisture content increases for a given soil type. The Agency recognizes that in certain unsaturated soils, particularly clays, saturation may not be a conservative assumption. Initial breakthrough of leachate, in small amounts, may occur prior to the prediction, assuming saturation. For the purpose of categorization, EPA believes that it is more important to predict when a major amount of leachate may enter the aquifer. However, the owner or operator has the option of using an alternative method, including the detailed Subtitle C time-of-travel calculation or the wetting front approach.

Under this simplified approach (D/V method), the value selected for T can be used to determine which locations require liners and the type of liner that may be required. The methodology is based on the active life of the unit. A value of T equal to or greater than the active life of the MSWLF unit is classed as "long" and a T less than the active life as "short." A minimum cut-off value for T of 20 years has been selected because a minimum T precludes the siting of short duration units in relatively poor locations. This minimum value of 20 years for T was chosen because the average active life of a facility is approximately 30 years, and a facility usually consists of more than one unit. EPA therefore selected 20 years as the average life of a unit. T values that are long when compared to the active life of the unit would not need liner systems, while units with T values shorter than the active life of that unit would need liners.

The T value should be determined for each unit rather than for an entire facility. For example, an MSWLF may have a total life of 50 years but comprise several units with active lives less than 50 years each. The T for each of these units is a separate calculation.

(c) Relationship to Design Requirements. Combining P and T values results in a matrix comprising four blocks that correspond to separate categories, as shown in Figure 2. Each location category describes a hydrogeologic and climatic setting with unique characteristics that affect landfill design. For example, Category I has both good climatic characteristics for a landfill (limited precipitation indicated by the low P) and good hydrogeology (acceptable overburden characteristics evidenced by high T value). On the other hand, Category IV represents locations with poor climate and hydrogeology that require specific landfill designs (liners and LCSs) to compensate for the poor locational characteristics. The two key measures of precipitation and time-of-travel to the aquifer are used not only to establish the location categories, but to identify the landfill design requirements needed for a particular location.

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FIGURE 2

CATEGORICAL APPROACH

PRECIPITATION (P)	< Active Life*	≥ Active Life*
> 40 in./yr.	**IV** • LCS required • Liner required	**II** • LCS required • Liner not required unless needed for LCS
≤ 40 in./yr.	**III** • LCS not required unless need demonstrated • Liner required	**I** • LCS not required unless need demonstrated • Liner not required unless needed for LCS

TIME OF TRAVEL TO AQUIFER
(T)

* MINIMUM T VALUE IS 20 YEARS

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In Categories I and III, the low P value indicates that the potential for leachate generation is less than in Categories II and IV. This low potential is not to imply that leachate will not be generated in quantities sufficient to warrant a collection system at facilities in low P areas. The demonstration described earlier to determine if an LCS is necessary should be conducted.

In Categories II and IV, high P values indicate that climatic conditions are conducive to the continual generation of leachate. Leachate control, therefore, is necessary in order to prevent the buildup of a hydraulic head within the unit during the active life of the facility. Any leachate generated after the active life of the unit also must be collected.

In addition, the Agency believes that LCSs are necessary when flexible membrane liners are installed. FMLs are very efficient hydraulic barriers, and an LCS is necessary to remove the hydraulic head that accumulates over time. FMLs installed without such systems will ultimately result in the "bathtub" effect.

Facilities sited in Category I and II locations have overburdens that already satisfy the requirements that T at least equals the active life of the unit. Therefore, modifications to the overburden would not be necessary at these sites. Some Category I and II locations, however, may need a liner if they need an LCS and if the natural overburden material does not have a permeability low enough to allow the LCS to properly function. For example, a site may have an adequate thickness of silty sand to be classified as Category II, but the permeability of this silty sand may be inadequate to allow the LCS to function properly. The base of the unit may need to be modified.

Facilities sited in Category III and IV locations have overburden materials that do not have T values that are at least equal to the active life of the unit or 20 years, whichever is greater. These units should install earthen or synthetic liners or modify the existing subbase such that, in combination with the overburden, the composite T value meets the standard. This may require measures such as soil amendments, recompaction of existing materials, and installation of synthetic membranes.

As discussed earlier, under this approach a final cover system that prevents liquid filtration into the water after closure is necessary. Acceptable methods for determining the design for such a final cover were discussed in a previous section.

(3) Empirical Methodology. A third approach for determining the landfill design characteristics necessary to comply with this rule's design goal relies on the use of ground-water monitoring data from existing MSWLFs. Under this approach, an owner or operator planning lateral expansions of an existing facility or planning to build new units in similar locations to an existing unit could use ground-water monitoring results from existing units to determine if the new or expanded units need to employ designs that are more protective than the existing unit. If the concentration of constitutents detected in the existing units' ground-water monitoring wells do not exceed the design goal (and leachate from the unit could be reasonably expected to have reached the monitoring wells), then the new or expanded unit would not have to apply a more elaborate containment design than the existing unit has to comply with this rule's design goal.

Four conditions would have to be met before this approach could be used. First, the new or expanded unit must have sufficiently similar location and waste characteristics to the existing unit to not pose greater threats to human health and the environment than the existing unit. Second, the existing unit must have operated ground-water monitoring wells over a long enough period to allow for leachate generation and release (accounting for the time required for failure of any liners) and migration through the unsaturated and saturated zones to the monitoring wells. Third, the ground-water monitoring data must address the Phase I parameters (and Phase II parameters, if Phase II has been triggered). Fourth, the monitoring data must be supplemented with appropriate modeling to predict the fate of hazardous constituents over a time period equivalent to the post-closure care period proposed today. This approach would be used most frequently for expansions of existing MSWLFs that have conducted ground-water monitoring over a long period of time.

The Agency recognizes that all three approaches are new methodologies that have not been a part of permitting programs. Comment is requested on the appropriateness of these approaches to a specific permit program or an individual landfill design. Comment is requested on the overall approaches and on ways to modify any approach to make it easier to incorporate into an existing permitting program.

E. Subpart E—Ground-Water Monitoring and Corrective Action

EPA today is proposing ground-water monitoring and corrective action requirements to ensure that ground-water contamination at new and existing MSWLFs will be detected and cleaned up as necessary to protect human health and the environment. These requirements reflect Congressional intent, as interpreted through HSWA and the accompanying legislative history, that protection of ground water be a prime concern of the revised Criteria. HSWA specifically directed EPA to require ground-water monitoring as necessary to detect contamination and corrective action, as appropriate, to protect human health and the environment.

The existing Criteria under § 257.3–4 require that a facility or practice shall not contaminate an underground drinking water source beyond the solid waste boundary or beyond an alternate boundary established by the State. The existing Criteria define "contaminate" to mean the introduction of a substance that would cause: (1) An MCL for any of 10 inorganic chemicals, four chlorinated hydrocarbons, or two chlorophenoxys to be exceeded or (2) a background level to be exceeded for any of these 16 constituents when such background concentration already exceeds an MCL. The existing Part 257 does not specifically require facilities to monitor ground water beneath their units or to implement a corrective action program when ground-water contamination has occurred. Facilities that are in violation of the current Criteria, however, are required to close or enter into a compliance schedule with their respective State.

Today's proposed Criteria revisions completely replace the existing criteria for MSWLFs under 40 CFR 257.3–4, providing ground-water monitoring and corrective action requirements under 40 CFR Part 258 for all new and existing MSWLF units. The proposed requirements call for assessment of the hydrogeology beneath landfill units, ground-water monitoring, reports on ground-water quality, the establishment of ground-water trigger levels and ground-water protection standards, and corrective action. These requirements are discussed separately below.

The corrective action program proposed today addresses releases to ground water only. In section 4010 of HSWA, Congress specifically instructs the Agency to evaluate the current Subtitle D criteria (40 CFR Part 257) for their adequacy to protect human health and the environment from ground-water contamination. Congress clearly considers ground-water contamination to be the major concern, and indeed, requires the new criteria (today's proposal) to provide for ground-water monitoring to detect contamination and corrective action, as appropriate. For this reason, the corrective action program envisioned today addresses releases to ground water. In addition, there are other authorities the Agency may use to address corrective action at MSWLFs. These authorities (e.g., CERCLA, RCRA Section 7003, the Clean Water Act) may be used to address media other than ground water.

The Agency did, however, consider addressing corrective action for all media while developing today's proposal. The Agency requests comment on the need for corrective action requirements for surface water and soil contamination at MSWLFs. (The Agency currently is assessing the risks associated with releases to air from MSWLFs and is considering proposing regulations to control these emissions.) Currently, the Agency has very little data describing the extent or the risks posed by soil or surface water contamination at MSWLFs.

If corrective action requirements were deemed necessary for surface water and soils, the Agency would most likely consider provisions similar to those required for ground water. Specifically, the Agency would consider requiring monitoring, trigger levels, a corrective measures study, cleanup standards, and criteria for selecting remedies. Appropriate trigger levels for surface water may be water quality standards (WQS) (developed by the State based on Federal Water Quality Criteria) or, if a WQS was unavailable, MCLs may be appropriate (for surface waters used for drinking water). If neither MCLs nor WQS has been established, an appropriate trigger level may be a concentration that meets the criteria specified in § 258.52 of today's proposal, assuming consumption of the contaminated water. If the surface waters are designated for a use other than drinking water, the appropriate trigger level may be a concentration established by the State that meets the criteria specified in § 258.52 of today's proposal and takes into consideration the use or uses of the receiving waters.

Appropriate trigger levels for contaminants in soils might be concentrations that meet the criteria specified in § 258.52 of today's proposal and that assume exposure through consumption of the contaminated soil.

If trigger levels for soils and/or surface water cannot be developed (because a concentration that meets the criteria in § 258.52 is not available), an appropriate trigger level might be a State-developed concentration that serves as an indicator for protection of human health and the environment and incorporates the above-referenced exposure assumptions. If not health-based trigger level is available, the appropriate trigger may be the background concentration.

If the Agency expands the critiera to address corrective action for releases to all media, it may consider using the following compliance points. For soils, the point of compliance for achieving the cleanup level may be any point where direct contact exposure to the soils may occur. The State may specify the locations or methods for determining appropriate locations where soil samples should be taken to demonstrate compliance with the soil cleanup standard(s). For surface water, the criteria might require that the surface water cleanup standard be achieved at the point where the release(s) enters the surface water in its highest concentration. The State may specify the location where surface water or sediment samples should be taken to monitor surface water quality and to demonstrate that compliance with the surface water cleanup standard has been achieved.

1. Section 258.50 Applicability

Today's proposed ground-water monitoring and corrective action requirements apply to the owners or operators of all new and existing MSWLFs. The Agency has several reasons for applying ground-water monitoring requirements to all new and existing MSWLFs. First, the Agency believes that the Congressional intent was to require ground-water monitoring at all MSWLFs that may receive HHW or SQG waste. Section 4010(c) directs EPA specifically to include ground-water monitoring "as necessary to detect contamination" among the revisions to the criteria and, while allowing the Agency to consider practicable capability, does not identify any exceptions to this requirement. The legislative history also is silent with respect to any exemptions from ground-water monitoring.

Second, as discussed earlier in this preamble, EPA has evidence that gound water has been contaminated by MSWLFs on a local basis in many parts of the nation and on a regional basis in some heavily populated and industrialized areas. Evaluation of 163 MSWLF case studies has indicated ground-water contamination or adverse trends in ground-water quality at 146 of these landfills. The Agency recognizes that these case studies may not be representative of the universe of MSWLFs; however, they do provide examples of the impacts of improperly designed or operated MSWLFs.

Current data from a 1986 survey indicate that only 25 to 30 percent of MSWLFs currently are equipped with ground-water monitoring systems; therefore, the total number of MSWLFs that are contaminating gorund water is unknown. Information submitted by the States in 1984, however, indicated that ground-water contamination has been detected at 586 active MSWLFs or roughly 25 percent of those facilities that currently are monitoring ground water. The nature and extent of the contamination from these sites is unknown. In addition, as of May 1986, EPA has included 184 MSWLFs on the Superfund National Priorities List.

The case studies and risk assessments indicate that these failing landfills are located in a wide range of hydrogeologic and climatic settings, making it virtually impossible, on a regional basis, for the Agency to predict which existing landfills may be contaminating ground-water resources. Therefore, the ground-water monitoring requirements are not restricted to landfills of a particular age or region.

Third, ground-water monitoring is the most reliable method for determining whether a landfill is in compliance with the overall performance standard of the proposed Criteria revisions, i.e., to meet health-based limits for hazardous constituents in the ground water at the waste management boundary or alternative boundary specified by the State. Even the best designs, operating practices, and quality control procedures cannot always prevent unexpected failure of a landfill. Therefore, ground-water monitoring at all facilities, including those that are properly designed and operated, is viewed by the Agency as an essential measure to ensure protection of human health and the environment.

Because this proposal requires MSWLFs to conduct ground-water monitoring, today's action effectively prohibits the location of MSWLFs in areas where subsurface conditions prevent monitoring of contaminant migration from the landfill unit. MSWLFs in such unmonitorable areas will be unable to receive an operating permit from the State. Some geologic settings that could preclude effective ground-water monitoring are fractured bedrock where complex fractures and joint systems impede flow direction prediction, and areas where extensive subsurface mining or faulting has modified flow direction. The ability to perform corrective action as necessary also must be considered. It is the responsibility of the owner or operator to prove that a landfill unit can be monitored. The Agency requests comment on adding a specific location restriction for unmonitorable areas in the final rule.

Section 258.50(b) specifies that ground-water monitoring requirements of § 258.50 through § 258.55 will be suspended for owners and operators who can demonstrate that there is no potential for migration of hazardous constituents from the landfill unit to the uppermost aquifer during the active life, closure, or post-closure periods. The requirements of § 258.56 through § 258.58 are never suspended, however. The proposed limited suspension of the ground-water monitoring requirements provided in the § 258.50(b) is designed for MSWLF units located in hydrogeologic settings that prevent leachate migration to ground water for very long periods of time. In such a setting, leachate from the MSWLF should not be able to reach the uppermost aquifer during the active life, closure, or during post-closure care. Because of the very favorable hydrogeologic conditions, such settings are highly desirable for the location of MSWLFs and the Agency wishes to encourage the use of these settings. Furthermore, requiring ground-water monitoring in these settings would place an additional financial burden on the owner or operator with very little added protection to human health and the environment. The financial burdens placed on owners or operators in these settings would be high because of increased drilling costs caused by the extreme depths to ground water that are typical in these settings.

The Agency intends to ensure that there is a high degree of confidence in the demonstration that no leachate will reach the uppermost aquifer before an exemption from the ground-water monitoring requirements is allowed. Therefore, today's proposal requires that the demonstration be conducted by a qualified geologist or geotechnical engineer based on site-specific hydrogeologic information or, where that is insufficient, based on assumptions that maximize the rate of hazardous constituent migration.

While § 258.50(a) of today's proposal requires ground-water monitoring at all MSWLFs, except in the rare circumstances described above, the Agency is proposing to ease the burden of this requirement by phasing in the ground-water monitoring requirements over time. The Agency is proposing this approach because the thousands of wells that will be needed at the approximately 6,000 existing MSWLFs are expected to cause shortfalls in the availability of competent hydrogeologists and drilling companies who must assist the owner or operator in sampling and analyzing the landfill's hydrogeology, provide recommendations on well placement, drill the appropriate bore holes and monitoring well holes, and install the monitoring wells.

Furthermore, the Agency recognizes that the proper review and evaluation of proposed ground-water monitoring programs will place significant demands on State resources. Therefore, § 258.50(c) of today's proposal requires States to establish compliance schedules for each facility within six months of the effective date of this rule. This six-month period is the maximum amount of time that a State should take in setting compliance schedules. The sooner an owner or operator knows when the MSWLF must be in compliance with the ground-water monitoring requirements, the better the necessary activities can be planned. The Agency has set goals for the percentage of existing units that must be in compliance after the effective date of this rule. Within two years of the effective date, 25 percent of the existing landfill units must be in compliance; within three years of the effective date, 50 percent of the existing landfill units must be in compliance; within four years of the effective date, 75 percent of the existing units must be in compliance; and all landfill units must be in compliance within five years of the effective date. Any new unit must be in compliance with the ground-water monitoring requirements before accepting waste.

States should set compliance schedules for each facility based on an evaluation of the potential risks posed by the facility. Risks posed to human health and the environment can be weighed by considering the proximity of human and environmental receptors, design of the landfill unit, age of the landfill unit, and resource value of the underlying aquifer. The Agency believes that ground-water monitoring is critical at existing facilities that pose a threat to human health or the environment and expects States to move aggressively to address these facilities as soon as possible.

If a State does not set a schedule of compliance for MSWLF units, § 258.50(d) specifies a compliance schedule for owners or operators of landfills. This "fall-back" schedule is based on distance to the nearest drinking water intake. While this method of setting priorities does not ascertain potential risk as well as the method outlined in § 258.50(c), it is objective and easy for an owner or operator to determine.

2. Sections 258.51–55 Overview of Ground-Water Monitoring Requirements

Today's proposed Criteria revisions require a system of monitoring wells to be installed at new and existing MSWLFs. The proposed Criteria revisions also provide procedures for sampling these wells and methods for statistical analysis of analytical data derived from the well samples to detect the presence of hazardous constituents released from MSWLFs. The Agency is proposing a two-phased ground-water monitoring program and a corrective action program. This phased approach to ground-water monitoring allows proper consideration of the transport characteristics of MSWLF leachates in ground water, while protecting human health and the environment. As shown in Figure 3, the proposed monitoring and corrective action programs provide for a graduated response over time to the problem of ground-water contamination as the evidence of such contamination increases, thereby keeping down costs.

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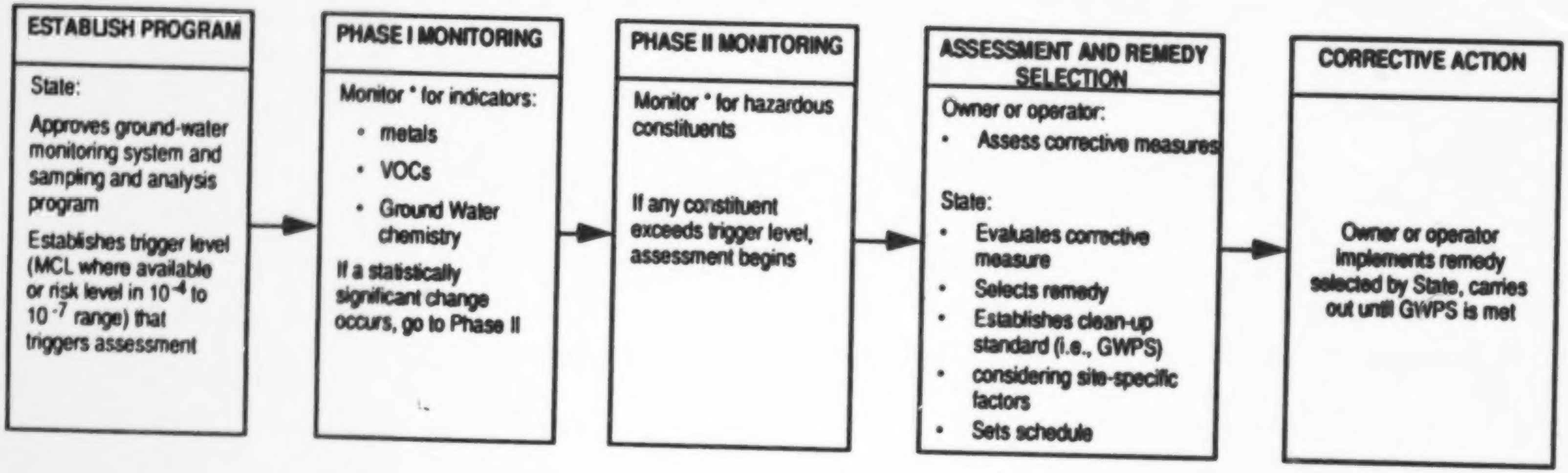
FIGURE 3

SUBTITLE D GROUND-WATER MONITORING AND CORRECTIVE ACTION


ESTABLISH PROGRAM
State:
Approves ground-water monitoring system and sampling and analysis program
Establishes trigger level (MCL where available or risk level in 10^{-4} to 10^{-7} range) that triggers assessment
PHASE I MONITORING
Monitor * for indicators:
• metals
• VOCs
• Ground Water chemistry
If a statistically significant change occurs, go to Phase II
PHASE II MONITORING
Monitor * for hazardous constituents
If any constituent exceeds trigger level, assessment begins
ASSESSMENT AND REMEDY SELECTION
Owner or operator:
• Assess corrective measures
State:
• Evaluates corrective measure
• Selects remedy
• Establishes clean-up standard (i.e., GWPS)
• considering site-specific factors
• Sets schedule
CORRECTIVE ACTION
Owner or operator implements remedy selected by State, carries out until GWPS is met

* Minimum monitoring frequencies: Semiannual during Phase I and quarterly during Phase II for constituents found above background.

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The proposal requires that all new and existing MSWLFs begin their ground-water monitoring programs by complying with the Phase I monitoring requirements. When a change in ground-water chemistry is indicated by an increase or decrease of two in more of parameters (1) to (15), or when any one of parameters (16) to (24) or the volatile organics (VOCs) listed in Appendix I is detected at statistically significant levels above background, Phase II monitoring is triggered. Phase II requires monitoring an expanded list of hazardous constituents (see Appendix II). If any of the Phase II parameters are detected at statistically significant levels above background, the owner or operator must compare those levels to the appropriate ground-water trigger levels. The State will set the ground-water trigger levels as specified in § 258.52. These "trigger levels" trigger the assessment of corrective measures and establishment of the ground-water protection standard. Corrective action continues until the owner or operator demonstrates compliance with the GWPS for a period of time determined by the State to be appropriate, based on site-specific factors. The Agency is considering changing its Subtitle C requirements from a three-year period to one that is site-specific. EPA requests comment on the appropriateness of a minimum period of compliance for Subtitle D.

The Agency is proposing that ground-water monitoring, once initiated, continue through post-closure care. Adequate post-closure care is essential for continued protection of human health and the environment, and ground-water monitoring is necessary in determining the effectiveness of post-closure care. The Agency has not set minimum monitoring frequencies during the post-closure period, instead leaving that determination entirely up to the State. This decision was based on the idea that the appropriate frequency at which to monitor during post closure will vary significantly not only among units, but also over time. Site-specific information should be evaluated by the State when determining post-closure monitoring frequency. Factors that should be considered by the State include the hydrogeology of the site, the age and design of the landfill, and the operating history of the landfill. During the early years of post-closure care (e.g., 10 years), it may be appropriate to monitor as frequently as during the operating period. In many cases it may be appropriate to lessen the frequency of monitoring in the latter years of post-closure care. If during post closure a unit triggers the next phase of ground-water monitoring, it would be appropriate for the State to set a monitoring frequency the same as the minimum frequency designated for the operating period.

Comments are requested on whether individual monitoring wells at a landfill unit should be allowed to be in different phases of monitoring. The Agency is not proposing this option today, but believes that this option could be appropriate in situations where the unit is very large, and only a few monitoring wells have triggered the next phase of monitoring. Once corrective action had been triggered in one well, however, all of the ground-water surrounding the particular unit would be subject to corrective action provisions.

a. § 258.51 Ground-Water Monitoring Systems. Section 258.51 of the proposed Criteria specifies requirements pertaining to appropriate methods for constructing and placing ground-water monitoring wells. The purpose of these requirements is to ensure that consistent, reliable ground-water monitoring systems are installed at all MSWLFs. The Agency has specified the use of well systems because other technologies may not be as reliable as well systems for detecting changes in ground-water quality. In making this determination, the Agency reviewed many other methods of ground-water monitoring, including resistivity, ground penetrating radar, and lysimeters. Detailed discussions of the strengths and weaknesses of these methods for use in monitoring ground water at MSWLFs are provided in the background document for Subpart E of today's proposal.

The monitoring well system must be designed so as to monitor the performance of the landfill design in terms of its ability to meet the design goal (as defined in § 258.40(b)) in the aquifer at the waste management unit boundary or the alternative boundary as specified by the State pursuant to § 258.40. As such, well location is linked directly to the performance standard for the design of the landfill unit. If the unit is designed to meet the design goal at the waste management unit boundary, wells should be installed at the waste management unit boundary. On the other hand, if the unit is designed to meet the design goal at an alternative boundary, the wells should be installed at the alternative boundary.

Section 258.51 allows the placement of wells at the closest practical distance from the waste management unit or alternative boundary to account for the presence of important structures, such as run-off controls, anchors for liners, and gas lines, that would be impaired or destroyed by well installations in the area. Other factors can affect the exact placement of monitoring wells. In some hydrogeologic settings, perched water tables and/or other hydrogeologic phenomena may cause leachate from an MSWLF to travel horizontally for a significant distance before reaching the uppermost aquifer. Therefore, § 258.51(a) specifies that the State may select the closest practical distance downgradient from the waste management unit boundary or the alternative boundary (as specified by the State) if the State determines, based on site-specific hydrogeologic evaluations required in § 258.51, that the uppermost aquifer would not be affected directly beneath the appropriate boundary by release of leachate from the MSWLF.

In some cases, several discrete units may constitute the MSWLF. Because of topographic conditions and design limitations, constructing discrete cells may be the only means of constructing a landfill on the property. Section 258.51(c) states that separate monitoring systems are not required for each landfill unit at a multi-unit facility if the State approves the grouping of units. Such approval would be allowed only if the multi-unit ground-water monitoring system will be protective of human health and the environment. If local conditions make it infeasible or impractical to install a monitoring system around each landfill unit, the State may allow the grouping of units within one monitoring system. Factors that the State should consider when deciding whether more than one unit should be within a monitoring system include: the number of units, the spacing of the units, the orientation of the units to one another, the age of the units, and the hydrogeologic setting. The State should not approve the grouping of units within one monitoring system if the downgradient portion of the system would be located more than 150 meters from any landfill unit.

The Agency does not believe that there are any differences between MSWLFs and hazardous waste land disposal units with respect to the factors used to determine appropriate types of well materials or well construction techniques. Therefore, today's proposed performance standards for ground-water monitoring system design found in § 258.51(d) are similar to those specified for hazardous waste disposal facilities in 40 CFR Part 264. This similarity ensures consistent design and construction standards for monitoring wells at all RCRA landfill facilities.

Because hydrogeologic conditions vary widely from one site to another, it is not possible to establish requirements specifying the exact number, location, and depth of monitoring wells needed to adequately monitor ground water in the aquifer. Such requirements are dependent on actual site-specific aquifer and geologic conditions. Therefore, in § 258.51(e) the Agency has proposed that specifics of the system be based on aquifer thickness, flow rate, and flow direction, and the characteristics of the material overlying the aquifer. For example, a complex aquifer flow system may require multilevel wells to effectively monitor ground water. A facility located in an area of very low hydraulic gradient may be better monitored by a ring of wells, since mounding could cause contaminant flow in all directions.

b. Section 258.52 Determination of Ground-Water Trigger Level. This section discusses what procedures the State must follow when establishing appropriate trigger levels. Trigger levels must be established by the State before the Phase I monitoring program is initiated. The levels established are health- and environmental-based levels that are determined by the State to be indicators for protection of human health and the environment. Where appropriate, these levels are based on promulgated standards; otherwise, they are established by the State on the basis of general criteria described below.

Contamination exceeding trigger levels indicates a potential threat to human health or the environment that may require further study. Therefore, the owner or operator must conduct an assessment of corrective measures whenever concentrations of hazardous constituents in the ground water exceed trigger levels. Trigger levels provide the owner or operator a point of reference for suggesting and supporting alternative remedies during the assessment of corrective measures (see preamble discussion for § 258.56). Trigger levels must be distinguished from ground-water protection standards, which are established during the remedy selection process.

Under § 258.52 of today's proposal, the concentration limits for the trigger levels are: (1) Maximum contaminant levels promulgated under § 1412 of the Safe Drinking Water Act, or (2) if an MCL has not been established, the concentration limit is a health-based limit established by the State that meets the proposed criteria described in § 258.52(b)(2) (i–iv), or (3) if levels under (1) or (2) are not available, the concentration limit is a level established by the State that is an indicator for protection of human health and the environment, or (4) background levels, if such levels are higher than concentrations under (1), (2), or (3), or if concentrations under (1), (2), or (3) have not been established.

The MCLs are maximum concentrations of contaminants allowed in water used for drinking. They are based upon toxicity, treatment technologies, and other feasibility factors such as availability of analytical methods. The MCLs are set following an analysis based on health considerations as guided by the SDWA.

The use of MCLs is consistent with current ground-water protection standards under 40 CFR Part 264, Subpart F (Releases from hazardous waste disposal facilities). Under the 1986 Amendments to the SDWA, MCLs must be set for 83 specific contaminants by 1989 as well as for any other contaminants in drinking water that may have any adverse effect upon people's health and that are known or anticipated to occur in public water systems. Currently, there are 28 MCLs promulgated; relevant MCLs to these requirements are listed below in Table 2.

TABLE 2—MAXIMUM CONTAMINANT LEVELS

CAS No.	Chemical name	MCL (mg/L)
7440–38–2	Arsenic	0.05
7440–39–3	Barium	1.0
71–43–2	Benzene	.005
7440–43–9	Cadmium	.01
56–23–5	Carbon tetrachloride	.005
1308–38–9	Chromium (III)	.05
1333–82–0	Chromium (VI)	.05
106–46–7	para-Dichlorobenzene	.075
107–06–2	1,2-Dichloroethane	.005
75–35–4	1,2-Dichloroethylene	.007
72–20–8	Endrin	.0002
7439–92–1	Lead	.05
58–89–9	Lindane	.004
7439–97–6	Mercury	.002
72–43–5	Methoxychlor	.1
7782–49–2	Selenium	.01
7440–22–4	Silver	.05
93–72–1	Silvex (2,4,5-TP)	.01
8001–35–2	Toxaphene	.005
71–55–6	1,1,1-Trichloroethane	.2
79–01–6	Trichloroethylene	.005
75–01–4	Vinyl chloride	.002

The Agency is proposing that health-based concentrations established by the State be used for the trigger level when MCLs are not available. These health-based levels must meet four criteria listed under § 258.52(b)(2) (i–iv). First, they must be consistent with principles and procedures set forth in Agency guidelines for assessing the health risks of environmental pollutants, which were promulgated on September 24, 1986 (51 FR 33992, 34006, 34014, 34028).

Second, the levels must be based on scientifically valid studies conducted in accordance with the Toxic Substances Control Act Good Laboratory Practice Standards (40 CFR Part 792) or other equivalent standards. The Good Laboratory Practice Standards prescribe good laboratory practices for conducting studies related to health effects, environmental effects, and chemical fate testing and are intended to assure quality data of integrity. In addition, the Agency guidelines for assessing the health risks of environmental pollutants (cited above) cite several publications that outline procedures for evaluating studies for scientific adequacy and statistical soundness. Third, for carcinogens, these levels must be associated with a risk level within the protective risk range. (See discussion in Section IX.D.1.a. of today's preamble concerning the design goal and EPA's request for comment on alternative risk ranges.) Finally, for toxic chemicals that cause effects other than cancer or mutations, the levels must be equal to a concentration to which the human population (including sensitive subgroups) could be exposed on a daily basis without appreciable risk of deleterious effects during a lifetime. These criteria will ensure that the trigger level represents valid and reasonable estimates of levels in ground water that are safe for human consumption.

Health-based levels that have undergone extensive Agency scientific review, but that have not been formally promulgated, are available for many chemicals. The four criteria proposed in § 258.52 and discussed above will enable the State to use these nonpromulgated levels to derive trigger levels. Appendix III provided health-based levels that the Agency believes meet these four criteria for selected hazardous constituents. These levels may be used to determine trigger levels. EPA established these levels by an assessment process that evaluated the quality and weight-of-evidence of supporting toxicological, epidemiological, and clinical studies. These levels are discussed below.

For noncarcinogens, health-based limits based on Reference Doses (RfDs) have been developed by the Agency's Risk Assessment forum. An RfD is an estimate of the daily exposure a sensitive individual can experience without appreciable risk of health effects during a lifetime. The experimental method for estimating the RfD is to measure the highest test dose for a substance that causes no statistically or biologically significant effect in an animal bioassay test. The RfD is derived by dividing the "no observed adverse effect level" (NOAEL) by a suitable scaling or uncertainty factor. Confidence in the RfD is dependent on a number of factors, including the quality and duration of the animal study. The derivation of RfDs has been evaluated and verified by internal Agency review. Applying the standard drinking water exposure assumptions (i.e., a 70 kg person drinks two liters of water a day for 70 years) to RfDs yields the ground-water concentration limit. Appendix III lists the RfDs (mg/kg-day) for several hazardous constituents.

The use of the RfD is appropriate only for noncarcinogenic constituents. EPA science policy suggests that no threshold dose exists for carcinogens; in other words, no matter how small the dose, some risk remains. The dose-response assessment for carcinogens usually entails an extrapolation from an experimental high-dose range where carcinogenic effects in an animal bioassay have been observed, to a dose range where there are no observed experimental data by means of a preselected dose response model. The carcinogenic slope factors (CSFs), estimated by EPA's Carcinogen Assessment Group, may be used to calculate a dose that corresponds to a given risk level by dividing the risk level (e.g., 1×10^{-6}) by the CSF. CSFs for selected carcinogens are provided in Appendix III. This dose is called a risk-specific dose (RSD). An RSD is an estimate of the daily dose of a carcinogen that, over a lifetime, will result in an incidence of cancer equal to a given risk level.

The ground-water concentration, in milligrams per liter, can be calculated by multiplying the RSD by the average adult body weight (70 kg) over the average water intake (two liters of water per day). Chemicals that cause cancer also may evoke other toxic effects. These constituents may have both an RfD and RSD available. In these cases, the lower level (i.e., more protective) should be used as the trigger level.

EPA has developed a classification scheme for carcinogens based on the weight of evidence for carcinogenicity. This scheme is presented in the Agency's cancer guidelines (51 FR 3992). Appendix III includes the class for each carcinogen listed. Known or probable human carcinogens are designated as Class A and Class B carcinogens, respectively, under the Agency guidelines. Constituents for which the weight of evidence of carcinogenicity is weaker are known as Class C, or possible human carcinogens under the Agency's guidelines.

Examples are included in Appendix III to illustrate how the States may use RfDs and CSFs to set trigger levels. For carcinogens, the State may use the CSF to determine a trigger level anywhere within the protective risk range. (See discussion in Section IX.D.1.a. of today's preamble concerning the design goal and EPA's request for comment on alternative risk ranges.)

The Agency believes that the protective risk range is appropriate for setting a trigger level for carcinogens without a MCL. For new MSWLFs, the State should consider using the same risk level for trigger levels as was used for the design goal. For example, if the MSWLF was designed to meet a 1×10^{-5} risk level at the chosen boundary, then the MSWLF should be triggered into an assessment of corrective measures once that risk level (for carcinogens with no MCL) is exceeded. For existing MSWLFs, to ease implementation, the Agency suggests that the State choose one risk level to be used at an MSWLF for all carcinogens that do not have an MCL. The State may consider choosing a risk level to use at all MSWLFs within the State. As discussed in the preamble discussion for the design goal, the Agency is requesting comment on two alternatives to the protective risk range. Any change made to the proposed design goal criteria would most likely be made for the trigger level. For example, if a fixed risk level of 1×10^{-5} was required as a design goal, then the trigger levels for carcinogens without MCLs would also be required to be set at 1×10^{-5}.

RfDs and RSDs will be available soon through the Integrated Risk Information System (IRIS), a computer-housed, electronically communicated catalogue of Agency risk assessment and risk management information for chemical substances. IRIS is designed especially for Federal, State, and local environmental health agencies as a source of the latest information about Agency health assessments and regulatory decisions for specific chemicals. The risk assessment information (i.e., RfDs and RSDs) contained in IRIS, except as specifically noted, has been reviewed and agreed upon by intra-Agency review groups, and represents an Agency consensus. As EPA continues to review and verify risk assessment values, additional chemicals and data components will be added to IRIS. A hard copy of IRIS soon will be available through the National Technical Information Service. The background document for Subpart E contains further information on IRIS.

If MCLs or other health-based levels meeting the proposed criteria are not available or cannot be developed for use as trigger levels, § 258.52(b)(3) allows the State to establish a trigger level that acts as an indicator for protection of human health and the environment. In many cases, partial data or data on structural analogs will allow the State to estimate whether the detected level of a contaminant is likely to cause a problem. In other cases, other contaminants will be present at high levels (triggering an assessment of corrective measures in any case), and it will be clear that the constituent for which no level is available is not a driving factor in determining the risk at the site, even under worst-case assumptions concerning its toxicity. In such cases, it may not be necessary to specify a trigger level for that constituent.

Finally, background concentrations may be used as the trigger level when no health-based level or indicator is available or when background is higher than any health-based level.

c. Section 258.53 Ground-Water Sampling and Analysis. Section 258.53 of today's proposed Criteria revisions includes requirements for consistent sampling and analysis procedures that are designed to ensure accurate ground-water monitoring results. Also included in this section are requirements for determining ground-water flow rate and direction, establishing background ground-water quality and applying appropriate statistical analyses to detect any changes in ground-water quality beneath an MSWLF.

Section 258.53(a) requires that the sampling and analysis techniques used by owners and operators of MSWLFs be sufficient to provide an accurate representation of ground-water quality in the uppermost aquifer beneath the landfill. At a minimum, these procedures must address sample collection, preservation, shipment, chain-of-custody, and quality assurance and quality control (QA/QC). The Agency recommends Chapter 2 of the "RCRA Technical Enforcement Guidance Document" (TEGD) for use in complying with this section. Although this chapter of the TEGD contains a number of references to the hazardous waste requirements under 40 CFR Part 264, the recommended sampling and analytical procedures are appropriate for any solid waste disposal facilities, including MSWLFs. These recommendations provide clear descriptions of how to conduct ground-water sampling and analysis and also allow the use of alternate procedures on a site-specific basis. Therefore, by recommending the TEGD, the Agency is not ignoring the use of alternate procedures that are consistent with the level of performance reflected in the TEGD.

In the RCRA Subtitle C program, the Agency has observed problems with ground-water sampling procedures, monitoring well network design, laboratory analyses, and data interpretation. EPA believes that a rigorously enforced, comprehensive quality assurance program based on sound quality objectives and backed up with an appropriate set of reference methods and procedural guidance will assist in remedying these problems. As a result, the Agency is considering adding QA/QC requirements to the sampling and analytical methods for Subtitle C facilities under § 264.97(e). To avoid duplicating the problems of Subtitle C, § 258.53(a)(5) of today's proposal requires that QA/QC procedures be included in sampling and analysis techniques. Owners or operators should refer to EPA guidance on "Test Methods for Evaluating Solid Waste (Physical/Chemical Methods)" for information on QA/QC procedures (Ref. 34).

Section 258.53(d) of today's proposal requires that ground-water elevations be measured immediately prior to sampling. In addition, the owner or operator must determine the rate and direction of ground-water flow in the uppermost aquifer each time ground-water gradient changes. These requirements for determining ground-water flow rate and direction are included to ensure that any unexpected changes in these parameters will be recognized and that changes in the location or spacing of monitoring wells will be made as needed to maintain the integrity of ground-water monitoring systems. Ground-water flow rates and directions may vary seasonally or over a number of years due to human-made or natural causes and, because the spacing and location of wells are highly dependent on these parameters, the Agency has decided not to rely entirely on the measurements of these parameters made prior to well installation. In selecting a site-specific frequency, i.e., tied to changes in ground-water gradient, the Agency has attempted to strike a balance between areas where aquifers exhibit no variability and those that exhibit frequent changes in flow rate and direction. At facilities that overlie aquifers with little or no variability in gradient, these assessments may be fairly infrequent. At facilities overlying aquifers with more variable ground-water gradients, more frequent assessments of flow rate and direction may be required, based on measurements of piezometric surface taken at least semiannually. Ground-water flow rate and direction data should be presented in the form of a flow net.

Today's proposed ground-water sampling and analysis procedures also include requirements for establishing background ground-water quality. Information on background ground-water quality is essential for determining whether the presence of monitoring parameters or constituents beneath an MSWLF indicates leakage from the landfill unit. Section 258.53(e) requires the owner or operator to establish background values for those monitoring parameters or constituents included in the monitoring phase applicable to that MSWLF. For example, if the MSWLF currently is in the Phase I monitoring program, background values must be established for all of the Phase I parameters. Background values of all of the Phase II parameters must be established if Phase II monitoring is triggered. The minimum number of background samples needed to fulfill the statistical requirements will depend on the statistical procedures selected.

Background ground-water quality must be established in wells that are hydraulically upgradient of the MSWLF, except as allowed in §§ 258.53 (f) and (g). Section 258.53(f) states that background quality at landfill units may be based on samples from wells that are not upgradient from the landfill if hydrogeologic conditions do not allow the owner or operator to determine what wells are upgradient, and sampling at other wells will provide an indication of background ground-water quality that is as representative or more representative than that provided by upgradient wells. Areas with no hydraulic gradient and those with reversing hydraulic gradient (such as those influenced by tides) are examples of hydrogeologic conditions that could make it impossible to determine which direction is upgradient.

Section 258.53(g) of today's proposal gives the State flexibility in determining background ground-water quality on a site-specific basis where such levels cannot be measured on the facility. An example of such a situation would be a landfill unit that is leaking and causing a mounding effect (where leachate is flowing out of the unit in all directions). If the leachate flowed far enough from the unit, it could contaminate all of the ground water between the unit and the property boundary, thus leaving no uncontaminated ground water from which to determine background ground-water quality. The State would be able to set background values for this site. Background ground-water quality should be based on actual monitoring data from the aquifer of concern. A State may have well data from another landfill site that overlies the same aquifer, or the data may be from another type of well from which the State can obtain data. The reader is referred to the background document for Subpart E for a full discussion of this provision.

The requirements for applying the statistical procedures contained in §258.53(h) are the same as the procedures proposed on August 24, 1987, for hazardous waste disposal facilities under Subtitle C of RCRA (see 52 FR 31948). The Agency believes that the revised Subtitle C procedures are also appropriate for MSWLFs and provide sufficient flexibility to allow effective State implementation at MSWLFs. The final statistical procedures promulgated under § 258.53(h) will reflect comments received on this proposal as well as the final statistical package promulgated under Part 264.

The required statistical procedures for comparing background ground-water quality data to those samples taken at downgradient wells are included in today's Criteria revisions to clarify the purpose and timing of statistical comparisons and their relation to ground-water sampling events at MSWLFs. These requirements ensure that statistical comparisons of analytical results between background and downgradient monitoring wells will be made promptly after each sampling event, and will cover all applicable parameters and constituents at MSWLFs. For further discussion of the statistical requirements, the reader is referred to the preamble for the proposed Subtitle C procedures found at 52 FR 31948.

d. Section 258.54 Phase I Monitoring Requirements. The Phase I monitoring parameters proposed today in § 258.54 were developed with the dual objectives of providing a reliable means of detecting the possible presence of releases from MSWLFs while avoiding unnecessary analytical costs to the regulated community. The proposed list of Phase I parameters is consistent with the results of research conducted under the direction of EPA's Office of Research and Development and other institutions. These research results reveal that Phase I parameters (1)–(15) are reliable indicators of ground-water chemistry and possible precursors to other more hazardous constitutents that may be released later from MSWLFs. Furthermore, States typically require routine monitoring of one or more of these parameters (1) to (15) at MSWLFs as the primary means of detecting ground-water contamination. The major cations and anions on the Phase I parameter list are those used to classify ground water into geochemical facies. These parameters are, therefore, useful for tracking changes in the ground-water geochemistry that may occur as the result of leakage from an MSWLF. In addition, the Agency is proposing to require semiannual monitoring for the metals (arsenic, barium, cadmium, chromium, lead, mercury, selenium, and silver), cyanide, and 46 VOCs.

The Agency believes that these VOCs in Appendix I constitute the first group of potentially hazardous constituents that would be present in the ground water prior to other, less mobile, constituents proposed for Phase II (see Appendix II of the proposed rule.) Due to their chemical nature, these VOCs generally would not migrate any faster than the non-VOC Phase I parameters, but do migrate faster than most of the Phase II constituents. Research by EPA and other institutions that supports these statements is summarized in the background document to this Subpart.

Heavy metals and cyanide also can exist under certain conditions in a well-defined leachate ground-water plume, depending on the waste present in the landfill. It is not certain whether heavy metal concentration would be as significant in leachate plumes from newer MSWLFs as they tend to be attenuated more than other constituents, such as VOCs. MSWLF leachates containing heavy metals can, however, pose serious threats to human health and to aquatic environments; therefore, the Agency is proposing to include the heavy metals that are included in the primary drinking water standards along with cyanide and the VOCs as the minimum Phase I monitoring parameters.

The reader is referred to the background document for this Subpart for more information.

The Agency is proposing to include the following as the minimum Phase I parameters that must be monitored for at least semiannually:

(1) Ammonia (as N)
(2) Bicarbonate (HCO_3)
(3) Calcium
(4) Chloride
(5) Iron
(6) Magnesium
(7) Manganese (dissolved)
(8) Nitrate (as N)
(9) Postassium
(10) Sodium
(11) Sulfate
(12) Chemical Oxygen Demand (COD)
(13) Total Dissolved Solids (TDS)
(14) Total Organic Carbon (TOC)
(15) pH
(16) Arsenic
(17) Barium
(18) Cadmium
(19) Chromium
(20) Cyanide
(21) Lead
(22) Mercury
(23) Selenium
(24) Silver
(25) Volatile Organic Compounds listed in Appendix I

The Agency specifically requests comment on the proposed set of Phase I monitoring parameters and the monitoring frequency. EPA is proposing that the frequency of monitoring during Phase I be determined by considering aquifer flow rates in the vicinity of the monitoring wells and the resource value of the aquifer. Semiannual sampling is proposed as a minimum frequency during the active life and closure of a unit. This frequency also is the minimum specified in the ground-water monitoring requirements (40 CFR Part 264) for hazardous waste landfills. The Agency believes that a six-month maximum interval between sampling events is reasonable in terms of protection of human health and the environment and the burden on the regulated community. During post-closure care, a State may set a different minimum monitoring frequency.

Today's proposal does not set a minimum frequency for ground-water monitoring during post-closure care. Because of the variable length of the post-closure care period and the variability of site-specific conditions, the Agency believes it is more appropriate to allow States to determine the frequency of ground-water monitoring on a site-specific basis.

Section 258.54(d) states that a Phase I ground-water monitoring program must be expanded to Phase II ground-water monitoring when two or more of the parameters (1) to (15) are detected at levels that significantly differ from background levels. Because the parameters (1) to (15) are monitored to detect changes in ground-water chemistry beneath an MSWLF, both increases and decreases in these parameters may be significant. The Agency is not implying that decreased levels of any of these parameters indicate degradation of ground water, just that further monitoring should be done to determine what is causing the change in ground-water chemistry. For example, a change in water chemistry, such as a decrease in pH and sulfate, may indicate the release of liquids from a landfill. The Agency is proposing to use increases or decreases of any two or more of the parameters (1) to (15) to trigger Phase II monitoring because preliminary analysis of ground-water samples taken at MSWLFs show that: (1) Substantiated leachate contamination of ground water from MSWLFs normally involves more than one of those Phase I parameters and (2) levels of a single one of those Phase I parameters in backgroud ground-water samples in some areas of the country are highly variable, which could lead to false indications of contamination. Section 258.55(a) states that if anyone of parameters (16) to (24) or the VOCs listed in Appendix I is detected at levels that are statistically significant above background, the unit must begin Phase II monitoring. During Phase II monitoring, the owner and operator has the opportunity to revert back to Phase I monitoring if it is found that there has not been a statistically significant increase over background levels of relevant parameters (see § 258.55(e)).

Once an MSWLF has triggered Phase II monitoring, the owner or operator is not required to monitor parameters (1) to (15). States may require an owner or operator who has entered a Phase II monitoring program to continue occasional monitoring for parameters (1) to (15), particularly if that State has established corrective action requirements that involve those parameters. The Agency does not intend to require any corrective action for Phase I parameters (1) to (15) because: (1) It is not apparent that these parameters would ever occur at high levels without corresponding increases over background levels for many of the constitutents listed in Appendix II of the proposed regulations, (2) it is difficult to assign a target level for cleanup of the non-VOC, nonmetal Phase I parameters, since none of them are hazardous to human health at levels found in MSWLF leachate, and (3) cleanup of any Appendix II constituents is likely to result in concurrent cleanup of the other Phase I parameters to acceptable levels.

Section 358.54(d)(3) of today's proposal allow the MSWLF owner or operator to demonstrate that detection of significant changes in ground-water quality during Phase I monitoring was caused by sampling and analytical error or by a source other than the MSWLF. The Agency included this provision in today's proposal because it is known that sampling and analytical errors are made with sufficient frequency that they cannot be ignored. This provision avoids unnecessary costs to the owner or operator who would otherwise be required to begin Phase II monitoring. Furthermore, this provision is consistent with the RCRA Subtitle C regulations governing hazardous waste landfills. Owners or operators of MSWLFs attempting to make this demonstration must notify the State of their intent, submit the demonstration to the State in the form of a report, and continue the Phase I monitoring program. If the demonstration is not successful, the owner or operator must establish a Phase II monitoring program within a reasonable time period.

The Agency specifically requests comments on the list of Phase I monitoring parameters, methods for setting triggering mechanisms, and potential required actions at MSWLFs that are contaminating ground water only with non-VOC, nonmetal parameters (1) to (15) Phase I constituents. The Agency also requests information about any MSWLFs that are known to be causing significant contamination of ground water with only non-VOC, nonmetal Phase I constituents.

e. Section 258.55 Phase II Monitoring Requirements. If it is determined that the ground water contains significant increases (or decreases) over background levels of Phase I parameters, the Phase II monitoring program is triggered. The purpose of this phase of ground-water monitoring is to determine the concentration of hazardous constituents specified in Appendix II of today's proposal. Therefore, Phase II monitoring is initiated by sampling all wells and analyzing each sample for all of the constituents listed in Appendix II of today's proposal.

Triggering into Phase II does not necessarily indicate a threat to human health and the environment. Rather, entering Phase II monitoring signals the need to more fully analyze ground water to determine if any constituent has exceeded health-based levels (i.e., trigger levels). The technical basis for selection of the Appendix II parameters for Phase II monitoring is presented below and in the background document for Subpart E of today's proposal.The Agency's major objective on identifying the constituents for Phase II monitoring was to include those hazardous constituents that pose risk to human health and the environment, are present in MSWLF leachate, and may potentially migrate to ground water. The proposed constituents (Appendix II of today's proposal) are the same as those used for the GWPS at hazardous waste disposal facilities under Subtitle C of RCRA. The Agency considered several options for the specific list of Phase II constituents. The regulatory alternatives included: (1) The list of constituents in the current Subtitle D Criteria, (2) the list of priority pollutants, (3) a list of all constituents that have been found in MSWLF leachates, (4) a site-specific list of constituents, based on analyses of leachate samples, and (5) the list of constituents in Appendix II.

The first option the Agency considered was the 10 inorganic chemicals, four chlorinated hydrocarbons, and two chlorophenoxys specified in the current Criteria (40 CFR Part 257). This option was rejected because the Agency's analytical leachate data indicate the presence of numerous other toxic organic compounds that would not be addresed by this option.

The second option considered was the list of priority pollutants under section 307(a)(1) of the CWA. The constituents on this list are toxic, and many have been found in leachate samples from MSWLFs. Because the list fails to include many constituents that have been detected in MSWLF leachate, however, the priority pollutant list was rejected for use as the GWPS.

The Agency considered a third option of developing a new list of constituents for Phase II monitoring at MSWLFs. The new list would have been compiled from existing data on the types of toxic compounds that have been detected in leachate samples from MSWLFs. EPA's current data on MSWLF leachate are limited but indicate the tremendous range of constituents and concentrations that may be found in MSWLF leachate. Altogether, data were received for 59 landfills, with 37 landfills providing both organic and inorganic leachate analyses, 7 landfills providing only organic analysis, and 15 landfills providing only inorganic analysis. Sixty-four hazardous organic constituents were identified as well as 49 hazardous inorganic constituents and other parameters. In most cases, the list of constituents analyzed for was unknown, so these data may not indicate the full range of constituents that may be found in the leachate even from these MSWLFs. Thus, this option was rejected because of data limitation, particularly for hazardous organic constituents.

The fourth option the Agency considered was developing site-specific Phase II monitoring constituents through the analysis of leachate samples from each MSWLF. This approach would allow owners and operators of MSWLFs to limit their analyses to only those hazardous constituents present in the leachate of their landfill. The Agency has the following concerns with this approach: (1) It is unworkable for sites with no leachate collection system (including the majority of existing landfills), (2) it does not account for degradation processes occurring during constituent migration through the unsaturated zone and ground water, and (3) it would require periodic resampling of the leachate to account for the wide variations in leachate quality over time. The Agency is interested in comments on the efficacy of this approach for facilities that have leachate collection systems.

The option adopted in today's proposal was to use the Appendix II constituents. Sixty-nine of the constituents in Appendix II have been found in MSWLF leachate. This number is based on limited data, particularly for hazardous organic constituents. In examining the variability of substances appearing in landfill leachate samples and all the potential waste streams that may be placed in MSWLFs, the Agency has concluded that any of the Appendix II constituents potentially could be present in ground water beneath an MSWLF at levels that may pose threats to human health and the environment. The Agency requests comments on the constituents proposed for Phase II monitoring at MSWLFs.

Section 258.55(c) requires the MSWLF owner or operator to sample the ground water in all monitoring wells and determine which, if any, of the Appendix II constituents are present in the ground water at concentrations that significantly exceed background levels. This activity must be done within 90 days after triggering Phase II. If the owner or operator concludes on the basis of the Appendix II constituent scan that none of the constituents significantly exceed background levels, pursuant to § 258.54(d), the State must determine the frequency for any subsequent Appendix II constituent scans to be conducted at the MSWLF during the active life or post-closure care.

Section 258.55(e) of today's proposal allows MSWLFs to revert to a previous phase of ground-water monitoring after the owner or operator determines that there has not been a statistically significant increase over the background levels of the relevant monitoring parameters. This proposal is similar to changes being considered for ground-water monitoring under Subtitle C of RCRA, and is particularly applicable to Subtitle D, under which the practicable capability of the owner or operator can be considered. The Agency realizes that it can be very difficult to prove that error in sampling or analysis caused the indication of a statistically significant increase above background levels of a ground-water monitoring parameter. If such an error were to occur and could not be proven to be the cause, a unit would be triggered into a higher and more costly phase of ground-water monitoring. The owner or operator would be forced to pay for a more costly monitoring program for an indefinite time period, with no added benefit to human health or the environment. Allowing a unit to revert to a previous phase of monitoring when no constituents have been detected above background levels eases the financial burden of the owner or operator without harming human health or the environment. A specific time period over which monitoring must be conducted before reverting to a previous monitoring phase has not been proposed, based on the concept that the appropriate time period should be site-specific. A minimum time period also was not proposed, but the Agency requests comments on the appropriateness of a minimum time period.

It should be noted that the criterion for returning to Phase I monitoring (i.e., background levels for Appendix II constituents) is consistent with those for facilities that have never entered Phase II monitoring. Therefore, an MSWLF may not return to Phase I monitoring merely by maintaining concentration levels at the trigger levels that initiate corrective measures assessment. Instead, before returning to Phase I monitoring, the concentration levels for Appendix II constituents must be at or below the background, which is the level that initiates phase II monitoring for a reasonable time period determined by the State.

If any Appendix II constituents are detected at statistically significant levels above background, § 258.55(f) requires the owner or operator of the MSWLF to notify the State of this fact in writing within 14 days; and, within 90 days of the finding, he or she must submit to the State a report containing all data necessary for establishing a ground-water trigger level.

Section 258.55(f)(2) of today's proposal requires that each hazardous constituent that is present at levels exceeding background concentrations must be analyzed from ground-water samples taken on a quarterly basis. The Agency believes that the presence of hazardous constituents over background signals the need for a more thorough assessment of the ground-water condition, necessitating more frequent monitoring than for Phase I. Thus, the Agency is proposing quarterly monitoring at a minimum to provide the earliest possible indication of when the trigger level has been excceeded. This approach is consistent with the approach taken in other Agency ground-water monitoring programs, such as under Subtitle C of RCRA. More frequent monitoring may be required by the State depending on site-specific conditions, such as ground-water flow rates and directions. The Agency considered alternatives that would require more stringent minimum frequencies, but these alternatives would have been unnecessarily burdensome at sites where ground water travels a distance of only a few feet per year. Therefore, today's proposed minimum frequency balances the need for early detection and thorough assessment with the statutory need to consider the "practicable capability" of the regulated community.

In addition to the quarterly monitoring for those constituents exceeding background, § 258.55(d) requires that each MSWLF monitor other Phase II constituents (Appendix II constituents) on a periodic basis to determine if any additional constituents have entered the ground water at concentrations that significantly exceed background levels. The frequency for monitoring these other Phase II constituents is determined by the State. These periodic analyses are essential for use in determining whether the design of an ongoing corrective action program must be changed to accommodate the treatment or removal of additional constituents. The Agency considered requiring annual Appendix II analyses at all MSWLFs, but the Agency believes selecting an appropriate frequency based on site-specific factors is essential given that Phase II constituent analyses may approach $3,000 per sample. The "practicable capability" of the owner or operator needs to be considered. The Agency's decision to allow State determination of the frequency for periodic Appendix II analyses also is based on the fact that site-specific conditions will have a significant impact on the release of any new constituents to the ground water from an MSWLF. The State also must determine the frequency for Phase II constituent analyses during post-closure care for those constituents that have exceeded background concentrations.

Under § 258.55(g), if the periodic analyses of Appendix II constituent reveals additional constituents in the ground water that are present at above-background levels, the owner or operator must notify the State within 14 days and, within 90 days, must submit a report on the concentrations of these new constituents. The MSWLF also must begin monitoring these new constituents at the minimum quarterly rate, which is required for all Phase II parameters that have exceeded background levels. Under § 258.55(h), if any Phase II parameters are detected at concentrations that exceed the ground-water trigger level, the MSWLF owner or operator must notify the State of this finding within 14 days. The owner or operator of the MSWLF also must begin to assess corrective measures as required under § 258.56 and continue to follow the Phase II monitoring program requirements.

The proposed Phase II monitoring requirements under § 258.55(h)(4) allow the owner or operator to demonstrate that an increase over the ground-water trigger level was caused by a sampling or analytical error or by a source other than the MSWLF. The rationale for including this demonstration in today's proposal is provided under the discussion of the Phase I monitoring program in this preamble.

3. Section 258.56 Assessment of Corrective Measures

An assessment of corrective measures is required whenever concentrations of hazardous constitutents in the ground water exceed trigger levels. Trigger levels are health- and environmental-based levels established by the State as indicators for protection of human health and the environment (see preamble discussion for § 258.52).

The State shall specify the scope of the corrective measures study. Factors that generally may be appropriate are listed in § 258.56(c). The purpose of the assessment is to study potential corrective measures. In general, the extensiveness of the assessment (i.e., the number and type of alternatives evaluated) should be commensurate with the complexity of the site. (The reader is directed to the Background Document for Subpart E for a more detailed discussion of what may be appropriate for specific situations.) There may be some situations where a limited assessment is appropriate. For example, if the ground water is known to be Class III ground water (see preamble discussion for § 258.57(f)(2)) and remediation will not be required, the assessment may be limited to an evaluation of institutional-type controls to limit exposure.

Under § 258.56(c), the Agency specifies several activities that the State may include in the scope of the assessment. First, the State may require the owner or operator to assess the effectiveness of potential remedies in meeting the requirements and objectives of the remedy (for a discussion of these requirements and objectives, see the preamble discussion for § 258.57 (b) and (c)). Next, the State may require the owner or operator to perform an evaluation of the performance, reliability, ease of implementation, and impacts (including safety, intermedia contaminant transfer, and control of exposures to residual contamination) associated with any potential remedy evaluated. In evaluating the performance of each remedy, the owner or operator should evaluate the appropriateness of specific remedial technologies to the contamination problem being addressed. During this assessment, the owner or operator may need to conduct additional monitoring to characterize the nature and extent of the plume of contamination.

Analysis of a remedy's performance, reliability, and ease of implementation may include an assessment of its effectiveness in achieving intended functions of containment, treatment, remediation, or disposal of the hazardous constituents and the degree of protection afforded human health and the environment. In addition, consideration should be given to the frequency and complexity of necessary operation and maintenance and the extent to which the technology has been successfully demonstrated under analogous conditions. The technical feasibility for the remedial strategy should also be considered in terms of ability to construct and operate the remedial technologies and the availability of necessary treatment, storage, or disposal services, and capacity.

The Agency is particularly concerned about potential cross-media impacts (intermedia transfer of contaminants) of remedies, and, therefore, the Agency specifically identified them as an area that the State may require the owner or operator to consider. Some remedial technologies may cause secondary impacts. For example, in some circumstances, air stripping of VOCs from ground water may release these VOCs to the air unless specific emissions control devices are installed on the air stripper.

In today's proposal, the State also may require the owner or operator to evaluate the timing of the potential remedy (§ 258.56(c)(3)), including construction, start-up, and completion time. Timing will be important in distinguishing among remedies. The State ultimately determines the compliance schedule for final cleanup of the ground water under § 258.57(d).

The owner or operator may be required by the State to include cost estimates for alternatives considered (§ 258.56(c)(4)). Cost estimates will be very important to the State when approving the selected remedy. The practicable capabilities of the facility, including the capability to finance and manage a corrective action program may be considered by the State in determining the duration of the clean-up. Therefore, the cost of the remedy may affect the remedy selected and the timing of the cleanup (see preamble discussion of § 258.57(d)).

The owner or operator may be required to consider institutional requirements under § 258.56(c)(5). For example, local governments may have specific requirements related to the remedial activities that may affect implementation of the remedies evaluated.

Finally, the State may require the owner or operator to evaluate the public acceptability of alternatives. The consideration of community concerns is a decision factor that the State will use in selecting a remedy (see § 258.57(c)(5)).

Under the proposed § 258.56(d), the State may require the owner or operator to evaluate one or more specific potential remedies. These potential remedies may include innovative technologies. The State may know of technologies that have been successful at other landfills with similar contamination problems. The proposed § 258.56(e) requires that, after all remedies have been evaluated, the owner or operator must submit a report to the State on the assessments so that the State may choose which remedy should be implemented.

Under proposed § 258.56(f), if the State determines at any time that human health or the environment are being threatened by the release of hazardous constituents from the MSWLF, the State may require the owner or operator to implement the measures required in proposed § 258.58 (a)(3) or (a)(4) (see preamble discussion of § 258.58(a)).

4. Section 258.57 Selection of Remedy and Establishment of Ground-Water Protection Standard

The proposed § 258.57 outlines the general requirements for selection of remedies for MSWLFs. As structured, it establishes four basic standards that all remedies must meet and specifies decision criteria that will be considered by the State in selecting the most appropriate remedy. In addition, decision factors for setting schedules for initiating and completing remedies are outlined, and specific requirements for establishing ground-water protection standards, including requirements for achieving compliance with them, are contained in this section.

Proposed § 258.57(b) specifies that all remedies must: Be protective of human health and the environment; attain ground-water protection standards as specified pursuant to § 258.57 (e) and (f); control the sources of releases so as to reduce or eliminate, to the maximum extent practicable, further releases that may pose a threat to human health or the environment; and comply with standards for management of wastes as specified in § 258.58(d).

These standards reflect the major technical components of remedies: cleanup of releases, source control, and appropriate management of wastes that are generated by remedial activities. The first standard—protection of human health and the environment—is a general mandate derived from the RCRA statute. This overarching standard requires remedies to include those measures that are needed to be protective, but are not directly related to ground-water protection, source control, or management of wastes. An example would be a requirement to provide alternate drinking water supplies in order to prevent exposure to releases to ground water used for drinking water. Another example would be barriers or other controls to prevent direct contact with the unit.

Remedies will be required to attain the ground-water protection standards that will be specified for the remedy by the State according to the requirements outlined below. The GWPS for a remedy often will play a large role in determining the extent of and technical approaches to the remedy. In some cases, certain technical aspects of the remedy, such as the practicable capabilities of remedial technologies, may influence to some degree the GWPS that are established. It is because of this interplay between cleanup standards and other remedy goals and limitations that today's rule establishes requirements for GWPS within the overall remedy selection structure of § 258.57. Thus, the standard setting process and the remedy selection process occur concurrently with both processes affecting the other.

Section § 258.57(b)(3) is the source control standard for remedies. A critical objective of remedies must be to reduce further environmental degradation by controlling or eliminating further releases that may pose a threat to human health and the environment. In some cases, unless source control measures are taken, efforts to clean up releases may be ineffective. EPA is persuaded that effective source control actions are an essential part of ensuring the effectiveness and protectiveness of corrective actions at MSWLFs.

The standard of § 258.57(b)(3) requires that further releases from sources of contamination that may pose a threat to human health or the environment be controlled to the "maximum extent practicable." This qualifier is intended to account for the practicable capabilities of the owner or operator and the technical limitations that may, in some cases, be encountered in achieving source controls. For some very large MSWLFs, engineering solutions such as treatment or capping to prevent further leaching may not be technically feasible or completely effective in eliminating further releases above health-based contamination levels. In such cases, source control may need to be combined with other measures, such as plume management or exposure controls, to be an effective and protective remedy.

The Agency does not intend this source control requirement to disrupt solid waste disposal at operating MSWLFs that have contaminated ground water. The Agency believes that, until the MSWLF is closed with an appropriate final cover (pursuant to § 258.40), other effective measures may be implemented. For example, depending on the source(s) of the release(s), capping inactive cells or units may help to control further releases. As mentioned above, plume management and exposure controls also may be needed, especially while the facility is continuing to receive waste.

The concept of effective source control as a remedial objective, as expressed by this remedy standard in § 258.57(b)(3), is closely linked to the CERCLA preference for Superfund remedial actions that utilize "permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable."

The proposed remedy standard of § 258.57(b)(4) requires that remedial activities that involve management of wastes must comply with the requirements for solid waste management, as specified in § 258.58(d) in today's proposed rule. Remedies may involve treatment, storage, or disposal of wastes, particularly in the context of source control actions. This standard will ensure that management of wastes during remedial activities will be conducted in a protective manner. The Agency requests comment on the four proposed standards for remedies.

Proposed § 258.57(c) specifies general factors to be considered by the State in selecting a remedy that meets the four standards for remedies. These factors, which generally are consistent with the evaluation criteria specified in SARA, are discussed briefly below. The Agency requests comment on these factors.

These factors are meant to aid the States in evaluating the data provided by the owner or operator as a result of the assessment of corrective measures. The general decision factors are: (1) Long- and short-term effectiveness and protectiveness, (2) reduction of future releases, (3) implementability, (4) practicable capability of the owner or operator, and (5) community concerns.

The first two factors described under § 258.57(c) are directly linked to the standards for the remedy. The long- and short-term effectiveness and protectiveness of the remedy is a measure of whether human health and the environment will be protected while the remedy is being implemented and once it is completed. It also is a measure of whether the GWPS can be met. The second factor, the reduction of future releases, should be used in evaluating how well the source control standard has been met. The practicable capability of the owner or operator also may be considered when evaluating to what extent source control can be achieved.

The Agency believes that the implementability of potential remedies also must be considered by the State when evaluating remedies. Factors that may affect the implementability of a remedy included: (1) The degree of difficulty associated with constructing the technology, (2) the expected operational reliability of the technologies, (3) the availability of necessary equipment and specialists, and (4) the available capacity and location of needed treatment, storage, and disposal services.

The practicable capability of the owner or operator is another remedy selection factor. As described elsewhere in this preamble, practicable capability includes both economic and technical capability of the owner or operator. The consideration of practicable capability allows the State to choose the remedy or combination of remedies that can meet the overall goal of protection of human health and the environment. This may affect the timing of corrective action, and, therefore, practicable capability has been listed as a factor for the States to consider in establishing the cleanup time frame (see preamble discussion of § 258.57(d)). In addition, as mentioned previously, the practicable capability of the owner or operator may be considered by the State in defining to what extent the source of releases will be controlled.

Community concerns is another factor that the Agency believes must be considered by the State when selecting a remedy. It is very important that the community has confidence in the remedy, how it was chosen, and the party responsible for implementation. The success of the corrective action process with regard to community involvement may significantly affect the siting of future MSWLFs in that community.

Any remedy proposal developed during the assessment of corrective measures presented to the State for final remedy selection must, at a minimum, meet the four standards of § 258.57(b). The State then will evaluate those remedies. The decision factors discussed above will be used by the State in selecting the appropriate remedy. The relative weight given to any one of the factors will vary from facility to facility. For example, short-term effectiveness considerations may be of particular concern where remedial activities will be conducted in densely populated areas, or where waste characteristics are such that risks to workers are high and special protective measures are needed. Implementability factors will often play a substantial role in shaping remedies—some technologies will require State or local permits prior to construction, which may increase the time needed to implement the remedy.

Proposed § 258.57(d) would require the State to specify a schedule for initiating and completing remedial activities as a part of the selection of remedy process. This provision gives the States the flexibility to prioritize MSWLF cleanups within their borders. The Agency believes that the flexibility these factors (described below) allow is essential considering the practicable capability of many MSWFs. Further, the Agency believes that the use of these factors will not in any way compromise protection of human health or the environment.

The Agency is proposing that the State consider numerous factors in determining the cleanup time frame. First, threats to human health or the environment from exposure to contamination during implementation of the corrective action program must be considered. Ground-water cleanup should be hastened if protection of human health and the environment cannot be ensured. Current ground-water users and actual or potential ecological damages must be identified. Second, the extent and nature of the contamination should be considered to determine what remedies and time frames are technically feasible.

The resource value of the contaminated aquifer is a third factor. Resource value is broadly defined as the value of the aquifer as a current and future water supply for domestic, industrial, agricultural, and other beneficial uses. This provision allows the States to balance the resource value of the affected ground water against the corrective action costs to determine the corrective action time period. States then can determine and require, at a minimum, that owners or operators implement the combination of replacement and corrective actions that most efficiently address the short- and long-term protection of human health and the environment. When evaluating the resource value of the aquifer, States should consider the value of the regional aquifer, not just the value of the portion of the aquifer affected by the facility. In addition, local values with respect to maintaining uncontaminated aquifers should be considered.

A fourth factor to be used by the state in determining the corrective action time period is the availability of treatment or disposal capacity for any waste managed during the corrective action program. Capacity should be ensured before removal or treatment of the wastes or ground water begins. In addition to ensuring capacity, the owner or operator must also ensure that wastes will be managed in compliance with requirements in § 258.58(d).

The fifth and sixth factors concern remedial technologies. New and innovative corrective action technologies are being investigated continually and it may be appropriate for the State to postpone ground-water remediation if a new technology (i.e., one that currently is not available) offers significant advantages over current technologies. Along the same lines, the State must consider the practicable capabilities of existing remedial technologies before setting up a compliance schedule. For example, the amount and complexity of construction needed to implement a particular remedical technology could be an important factor or the amount of time that would routinely be needed to achieve the GWPS given a specified technology.

The States also may consider, in dtermining a cleanup time schedule, the practicable capability of the owner or operator of the MSWLF. These capabilities include both the economic and technical capabilities of the owner and operator to initiate the corrective action program. As mentioned previously EPA does not intend to tradeoff environmental or human health protection for cost considerations. The use of practicable capability as a remedy decision factor was described earlier. Using the practicable capability of the owner or operator as well as other cost considerations (e.g., discussed in relation to resource value) in combination with the other factors described above to determine the cleanup time frame, allows the State to choose the combination of actions that will effectively and erfficiently protect human health and the environment and ensure that ground-water remediation is completed.

The proposed factors undr § 258.57(d) would allow the State to accept a combination of remedies to be implemented in discrete phases. This phased approach may affect the time required to achieve the final cleanup. Such an approach will ensure that important environmental problems are addressed first (interim measures may also be used; see preamble discussion of § 258.58(a)(4)). This phased approach may be frequently necessary at operating facilities to prevent the disruption of solid waste disposal. Initial actions would always include steps to prevent exposure to the contaminated ground water (e.g. make alternative water available). An initial remedial step may be to install a pump and treat system that would minimize further migration of the plume. These steps could continue until more active remediation or source control could be implemented.

Section 258.57(e) of today's proposal requires the State to establish a GWPS for each Appendix II constituent detected above trigger levels. The GWPS represents constituent concentrations that remedies must achieve. The GWPS is set on a constituent-specific basis during the remedy selection process.

The State must set the GWPS within the overall context of the remedy selection process. During the assessment of corrective measures (§ 258.56) the owner or operator should design remedies to meet target cleanup levels. These target cleanup levels may start out as trigger levels, but, as pertinent site-specific information becomes available, the State should modify the target levels. The remedies analyzed by the owner or operator should generally be designed to meet the target levels. The State will ultimately select a remedy and set a ground-water protection standard that must be achieved.

The State's primary consideration in setting ground-water protection standards will be to ensure that human health and the environment are protected. As in the case of trigger levels, the State should generally use promulgated health-based standards (e.g., MCLs) and GWPS, where they are available.

Where MCLs or other such standards are not available, the State may rely on RfDs and RSDs in developing ground-water protection standards (see preamble discussion of Determination of Trigger Levels for more information about RfDs and RDSs). For noncarcinogens, the State may set a level based on the RfD. States have flexibility to select a GWPS within the protective risk range (see preamble discussion of risk range alternatives being considered and of Determination of Trigger Levels).

A variety of site-specific and/or remedy-specific considerations may enter into the determination of where within the cancer risk range the ground-water protection standard for a given hazardous constituent will be established. The most appropriate level for cancer risk must be determined through an analysis of factors related to exposure, uncertainty, and technical limitations. Proposed § 258.57(e) lists five factors the State may consider in establishing GWPSs.

The first site-specific factor is multiple contaminants in the ground water. To ensure that individuals exposed to ground water will be protected, it may be necessary to consider the risks posed by other constituents in the ground water before a GWPS for a single constituent can be extablished. In considering the risks posed by multiple contaminants, the State should follow the procedures and principles established in the Agency's "Guidelines for the Health Risk Assessment of Chemical Mixtures" (51 FR 34014) issued on September 24, 1986. All other factors being the same, the GWPS for a constituent present in ground water that is contaminated with other constituents that pose significant risks should be established at a lower concentration than if that constituent were the sole contaminant in the ground water. Taken as a whole, once final remediation is completed, ground water must not pose a risk greater than 1×10^{-4}. To the extent practicable for new MSWLFs, the overall risk level for the ground water (not for each constituent) should be equivalent to the risk level used in meeting the design standard (see preamble discussion of § 258.40).

The second factor is actual or potential exposure threats to sensitive environmental receptors. Frequently, levels set for protection of human health also will be protective of the environment. However, there may be instances where adverse environmental effects may occur at or below levels that are protective of human health. Sensitive ecosystems or threatened or endangered species' habitats should be considered in establishing the GWPS.

The next factor is other site-specific exposures to the contaminated ground water. For example, residents living near a municipal solid waste landfill may receive unusually high exposures of hazardous constituents from other sources (e.g., lead from a lead smelter). These other exposures should be considered when developing the GWPS.

The last consideration is remedy-specific factors. The State must consider the reliability, effectiveness, practicability, and other relevant factors of the remedy when establishing a GWPS. For example, a remedy that can treat constituents in ground water down to concentrations posing a 1×10^{-5} risk level may be selected in preference to another remedy that might achieve a 1×10^{-6} risk level, but that relies on technology that has not been successfully demonstrated or may be unreliable for other reasons.

There also are technical limitations that must be considered, in addition to scientific information about the hazards to human health and the environment, in establishing ground-water protection standards. For example, GWPSs should not be set lower than detectable levels.

Proposed § 258.57(e)(5)(i) establishes that a GWPS hould not be set below background levels unless the State determines that cleanup to levels below background is necessary to protect human health or the environment. In general, the Agency believes that it may not be reasonable to require the owner or operator to reduce the concentrations of hazardous constituents to levels below background. In many cases such a reduction would not be technically feasible. Today's proposal, however, does not allow MSWLFs located in contaminated areas to ignore incrementally significant facility contributions to the contamination unless a determination is made under proposed § 258.57(f) that remediation is not required.

Proposed § 258.57(f) identifies three situations in which the State may decide not to require cleanup of a release to ground water of hazardous waste or hazardous constituents from an MSWLF, thus obviating the need to establish ground-water protection standards. These situations are limited to cases where there is no threat of exposure to releases from MSWLFs, or cases where cleanup will not result in any reduction in risk to human health or the environment. In any case, the State may impose under § 258.57(g) source control requirements to minimize or eliminate further releases from the MSWLF even if remediation is not required. The Agency does not believe that continued further degradation of the environment is warranted, even in those situations where cleanup may not be required.

In some cases, MSWLFs releasing hazardous constituents to the ground water will be located in areas that already are significantly contaminated. Where releases from the MSWLFs are trivial compared to the overall area-wide contamination, or where remedial measures aimed at the MSWLF would not significantly reduce risk, EPA believes that remediation of releases from the MSWLF would not be necessary or appropriate. In these situations, proposed § 258.57(f)(1) would allow the facility owner or operator to provide the State information demonstrating that remediation would provide no significant reduction in risk. If the demonstration were made, the State should determine that remediation is not necessary.

For example, ground water below a leaking MSWLF might be heavily contaminated from off-site sources. In this case, removal of the MSWLFs contribution to the contamination might have very limited benefit, particularly if that contribution was relatively minor. Control of the MSWLF releases might do very little, in such a case, to improve the overall situation in the area, yet (in the case of an operating unit) might be extremely burdensome to the owner or operator.

Two points should be stressed here, however. First, the facility owner or operator would be required to remediate the ground water where it could have a significant effect on reducing risks—for example, as part of an area-wide cleanup strategy. Second, in any case, under § 258.57(g) source control may be required to prevent further releases.

The Agency has not attempted to define "significant reductions" in risk in this rulemaking, and believes the decision is best made on a case-by-case basis by the State. However, the Agency seeks comment on whether a more specific definition is necessary for the purposes of this rulemaking.

Under proposed § 258.57(f)(2), the State may determine that a hazardous constituent that has been released from an MSWLF to ground water does not pose a threat to human health and the environment and, therefore, does not require remediation if: (1) The ground water is not a current or potential source of drinking water and (2) the ground water is not hydraulically connected with waters to which the hazardous constituents are migrating or are likely to migrate in a concentration(s) that represents a statistically significant increase over background concentrations.

In interpreting whether the aquifer meets these criteria, the State may use the approach outlined in the Agency's Ground-Water Protection Strategy (August 1984) as guidance. Typically, Class III ground waters will be considered to meet the requirements specified in § 258.57(f)(2)(i). Class III ground waters are ground waters not considered potential sources of drinking water. They are ground waters that are heavily saline, with TDS levels over 10,000 mg/l, or are otherwise contaminated beyond levels that allow cleanup using methods reasonably employed in public water system treatment. These ground waters also must not migrate to Class I or II ground waters or have a discharge to surface water that could cause degradation. The need to remediate Class III ground waters should be assessed on a case-by-case basis.

Proposed § 258.57(f)(3) would allow the State to make a determination that remediation of a release is not required when remediation is technically impracticable or when remediation presents unacceptable cross-media impacts. Such a determination may be made, for example, in some cases where the nature of the hydrogeologic setting would prevent installation of a ground-water pump and treat system (or other effective cleanup technology), e.g., in Karst formations or where heavily fractured bedrock lies under the facility. In these situations, the installation of such a system could possibly increase environmental degradation by introducing the contaminant into ground water that was not previously affected by the release. The Agency is persuaded that in this and other situations remediation should not be required. The Agency is specifically soliciting comment today on the types of situations that might warrant a determination that remediation of a release is technically impracticable or presents unacceptable impacts and would not, therefore, be required.

Proposed § 258.57(h) outlines the Agency's proposed approach to establishing conditions the owner or operator must fulfill to achieve and demonstrate compliance with the GWPS established by the State during the remedy selection process.

First, the GWPS must be achieved at all points within the plume of contamination that lie beyond the ground-water monitoring well system established under § 258.51(a). The ground-water monitoring well system is established at the boundary chosen for the design (i.e., at the unit boundary or a State alternative boundary that does not exceed 150 meters from the waste management unit boundary and is on land owned by the owner or operator of the MSWLF (see preamble discussion of § 258.51(a)). It is logical that cleanup be required up to the boundary for which the facility was designed to meet a health-based risk level.

The Agency also is proposing under § 258.57(h)(2) that the State specify in the remedy the length of time during which the owner or operator must demonstrate that concentrations of hazardous constituents have not exceeded specified concentrations in order to achieve compliance with GWPSs. Under existing Subtitle C regulations (§ 264.100), the Agency has required that facility owners or operators remediating ground-water contamination from regulated hazardous waste units continue corrective action until the designated GWPSs have not been exceeded for a period of three years. The Agency has found that, given the variety of hydrogeologic settings of facilities and characteristics of the hazardous constituents, it is difficult to demonstrate reliably that the GWPSs have been achieved by imposing a uniform time for demonstrating compliance. Consequently, the Agency is considering proposing changes to the Subtitle C program.

In today's proposal for MSWLFs, the Agency is proposing that the State specify the length of time required to make such a demonstration on a site-specific basis. As described under proposed § 258.57(h)(2), the State may consider four factors in setting this timing requirement: (1) The extent and concentration of the release, (2) the behavior characteristics of the hazardous constituents in the ground water, (3) the accuracy of the monitoring techniques, and (4) characteristics of the ground water. The Agency believes that consideration of these factors will allow the State to set an appropriate time period for demonstrating compliance with GWPSs rather than relying on an arbitrary time period for all facilities or all situations at the same facility.

One example of how these considerations might affect a decision on the time a ground-water protection standard must not be exceeded to demonstrate compliance is given here. The Agency expects that pump and treat systems will be necessary at many MSWLFs. Experience in the RCRA Subpart F program (which addresses releases of hazardous constituents to ground water from regulated hazardous waste units) has shown that continuous operation of a pump and treat system may interfere with the owner or operator's ability to obtain accurate sampling data on constituent concentration levels. Allowing natural restoration of chemical equilibrium in the affected ground water after the pump and treat system is turned off will be necessary to obtain accurate readings of constituent concentrations. If the concentration(s) rise to unacceptable levels after the remedial technology is disconnected, reinitiation of treatment may be required. This process would have to be repeated until acceptable concentration levels are achieved after chemical equilibrium has been reached in the ground water with the treatment system suspended.

5. Section 258.58 Implementation of the Corrective Action Program

Implementation of a corrective action program is required when hazardous constituents are detected at levels higher than the GWPS. Several activities are required of the owner or operator under proposed § 258.58. First, a corrective action ground-water monitoring program is required under proposed § 258.58(a)(1). This program must meet the requirement of the Phase II monitoring program (§ 258.55), demonstrate the effectiveness of the remedy(s), and demonstrate compliance with the GWPS.

Second, under § 258.58(a)(2), the owner or operator must implement the remedy(s) selected by the State under § 258.57. As described under § 258.57, the "remedy" encompasses not only the technology to be used to remediate the ground water (if remediation is to be conducted), but also the GWPSs to be reached and the time the owner or operator has to reach the standards (see preamble discussion of § 258.57).

Next, under § 258.58(a)(3), the owner or operator must notify all persons who own or reside on the land that overlies any part of the plume of contamination. The State may require the owner or operator to notify such persons any time the trigger level has been exceeded (i.e., before the GWPS has been established) if the State determines it necessary to protect human health or the environment (see § 258.58(f)).

Under the proposed § 258.58(a)(4) the State may require the owner or operator to conduct interim measures at an MSWLF whenever the State determines such actions are necessary to protect human health or the environment. The interim measures would serve to mitigate actual threats and prevent potential threats from being realized while a long-term comprehensive response can be developed. Interim measures should, when possible, be consistent with the expected final remedy. The State should consider the immediacy and magnitude of the threat to human health or the environment as primary factors in determining whether an interim measure(s) is required. Proposed § 258.58(a)(4)(i)–(vii) lists factors that the State may consider in determining whether an interim measure is required.

Interim measures may encompass a broad range of actions. For example, an owner or operator responsible for contamination of a drinking water well may be required to make available an alternative supply of drinking water as an interim measure in an effort to protect human health. This replacement action could be temporary or permanent. The duration of the period over which replacement supplies must be provided can affect the type of action selected. Replacement actions may include hooking up affected aquifers, relocating wells, and treating contaminated ground water at the point of use.

During the implementation stage, other factors may arise that make the chosen remedy technically impracticable. For example, the unexpected occurrence of an area of unstable soils may render the chosen source control remedy impossible to construct. Proposed § 258.58(b) describes factors the State must consider in making such a determination. In these instances, the State may require that the owner or operator implement other alternatives to control exposure to residual contamination as described under § 258.58(c). The State also may require the owner or operator to implement other source control options and other equipment, unit, device, or structure decontamination activities. The State will evaluate these alternative activities for their technical practicability and their consistency with the overall objectives of the original remedy. The GWPS will not be changed; however, the State may want to adjust the time allowed for completion of the remedy.

Proposed § 258.58(d) requires that wastes generated during the implementation of corrective action be managed in a manner that is protective of human health and the environment. In particular, the waste management practices must be in compliance with all applicable RCRA requirements.

According to proposed § 258.58(e), the remedy is considered complete when the GWPS has been achieved according to the requirements of § 258.57(h) and all other actions required in the remedy have been completed (e.g., source control measures). After the required remedy is complete, the owner or operator must submit a statement that certifies that the remedy has been completed in accordance with requirements under § 258.58(e). In addition to the owner or operator's signature the certification must contain the signature of an independent professional engineer geologist, or other appropriate technically trained person. According to § 258.58(g), after the State receives the certification and is satisfied that the remedy is complete, the State releases the owner or operator from the requirements for financial assurance for corrective action.

The Agency considered an alternative approach to the corrective action program proposed today. The alternative would involve the following steps. First: the owner or operator would be required to do three activities: (1) Report to the State any concentration of hazardous constituents in the ground water above trigger levels, (2) investigate the nature and extent of the contamination, and (3) take all necessary actions to abate any immediate risks to human health and the environment. Second, after the owner or operator submitted the results of the investigation, the State would assess, site-specifically, the risks to human health and the environment posed by the ground water contamination. Based on this assessment, the State would set site-specific requirements for clean up of the ground water (including cleanup levels). Next the owner or operator would be required to submit to the State for approval a plan for meeting the cleanup requirements. The owner or operator then must implement the approved plan. Modifications to the plan would be allowed, if needed, based on site-specific considerations. The approach would present fewer specific Federal requirements for cleanup. The Agency requests comment on this alternative approach as well as the proposed corrective action requirements discussed above.

X. Effective Date, Implementation, and Enforcement of the Revised Criteria

Subtitle D of RCRA, as amended by HSWA in 1984, requires the Administrator to revise the Criteria for sanitary landfills under § 4004(a) and the solid waste management guidelines under section 1008(a) for facilities that may receive HHW or hazardous wastes from SQGs. Subtitle D also contains specific requirements with respect to the implementation and enforcement of the revised Criteria for facilities that may receive these wastes. Of particular significance is the provision in § 4005(c) requiring that States adopt and implement, within 18 months of the promulgation of the revised Criteria, a facility permit program or other system of prior approval to ensure compliance with the revised Criteria. In addition, this section provides that "in any state that the Administrator determines has not adopted an adequate program * * * the Administrator may use the authorities available under section 3007 and 3008 of [Subtitle C] to enforce the prohibition contained in subsection (a) of this section with respect to such facilities." A discussion of the issues regarding the implementation and enforcement of the revised Criteria and the options the Agency is considering for addressing these issues is set forth below.

A. Effective Date of the Revised Criteria

EPA today is proposing that the revised Criteria become effective 18 months after their promulgation. The Agency considered an alternative two-stage approach, which is described below, but decided that 18 months is the most appropriate time period for several reasons.

1. Eighteen-month Period

First, the 18-month time period would coincide with the period within which States, under section 4005(c) of RCRA, are to adopt and implement a permit program or other system of prior approval to ensure that facilities comply with the revised Criteria. Congress provided this 18-month period after the promulgation of the revised Criteria to provide States adequate time in which to adopt new or revise existing applicable State standards and to institute a permit process for ensuring facility compliance. Because the States are given the lead responsibility for implementing the revised Criteria under these provisions, EPA believes it is critical to set an effective date for the revised Criteria that coincides with the date the States are required by RCRA to have their implementation mechanisms in place.

Second, the 18-month period would provide MSWLF owners and operators with sufficient time to take the necessary measures at their facilities to bring them into compliance. EPA recognizes that certain of the revised Criteria proposed today may require substantial efforts on the part of the facility owner and operator both in modifying management practices at an existing MSWLF and in planning full compliance for a new one. The fact that most MSWLFs are owned and run by local governments, which have limited resources, also is a consideration. Congress directed EPA to take into account the "practicable capability" of facilities in revising the Criteria. EPA believes that the proposed 18-month period for allowing MSWLFs to come into compliance recognizes the practicable capability of MSWLFs to meet certain of the revised Criteria.

Although EPA recognizes that some of the revised Criteria could be implemented in shorter periods of time, i.e., six or 12 months, EPA believes that a uniform effective date of 18 months would minimize confusion on the part of the regulated community. Also, while the 18-month period before the effective date proposed today would postpone application of the revised Criteria to MSWLFs, it would not leave these facilities unregulated. The current part 257 Criteria and applicable State standards would remain in effect for these facilities until the revised Criteria become effective. In addition, some States may adopt the revised Criteria, making them effective under their own authorities, before the 18-month period expires.

EPA recognizes that there are some limitations with this approach. EPA is concerned that the 18-month period between the promulgation and the effective date of the revised Criteria might allow some MSWLFs to close to avoid meeting the new requirements. The Agency does not intend for this period to be a window of escape for marginal MSWLFs. Experience shows, however, that MSWLFs do not open and close overnight. In fact, the long operating lives of most existing MSWLFs and years of advance planning needed for siting and permitting new facilities significantly mitigate against such actions. The Agency is aware that some closures may occur, however, and intends to work with the States to guard against closures performed in an unsatisfactory manner that may pose threats to human health and the environment.

2. Two-stage Approach

The 18-month approach would preclude enforcement of the revised Criteria through the citizen suit provisions of RCRA § 7002 pending their becoming effective. Thus, for 18 months, citizens will be unable to use RCRA to enforce the revised Criteria. For this reason, EPA is considering the option of establishing two stages of effective dates. The first stage of effective dates would be for only those requirements that can be implemented by the facility owner or operator in less than 18 months and are self-implementing on their face, thus, leading themselves to more immediate effective dates. The effective date would be set at six or 12 months after the promulgation date as appropriate for the specific requirement. The self-implementing provisions of this rule include the general operating criteria such as the liquids management restrictions, the disease vector and explosive gas controls, recordkeeping, and closure and post-closure planning requirements. The second-stage effective date would be limited to those requirements that require interactions with or determinations by the State and substantial efforts on the part of the facility owner or operator for effective implementation. These requirements include the ground-water monitoring and corrective action requirements. The two-tiered approach would maximize the use of citizen suit provisions during the 18-month period because some of the requirements would be in effect sooner, i.e., in 6 12 months; however, this approach runs the risk of causing considerable confusion on the part of regulated facilities and inconsistent application of the revised Criteria nationwide.

Although EPA has decided to propose an effective date for all the revised Criteria of 18 months after the date of promulgation, EPA specifically solicits public comment on the alternative two-stage effective date approach described above.

B. Review of State Permit Programs

Section 4005(c) of RCRA, as amended in 1984 by HSWA, requires the Administrator to determine whether each State has developed an adequate permit program or other system of prior approval and conditions to ensure that each solid waste disposal facility that receives HHW or SQG hazardous waste will comply with the revised Criteria. The Administrator also is given the discretionary authority to preform these reviews in conjunction with the reviews of State solid waste management plans under RCRA § 4007.

The Agency solicits comments concerning the most appropriate means for determining the adequacy of State permit or other prior approval programs. Issues include whether the Agency should confine its review to assessement of a State's permit or other prior approval program or whether the Agency should expand this review to include all the components of the State's solid waste management plan. Under the first option, the Agency only would review the State's permit or approval program that incorporated the revised Criteria. The Agency's review of the State program would be limited to that portion of the State's Subtitle D program. The Agency recognizes that an expanded review under the second option would provide the State with the flexibility to present additional elements of its solid waste management program, outside of the permit or other prior approval program, that help ensure the proper management of solid waste disposal facilities. In addition, this broader evaluation would provide the Agency with a better understanding and appreciation of State implementation activities under Subtitle D.

The latter option, however, would require all of the States to either develop or modify their solid waste management plans to reflect the revised Criteria. The development and/or modification of these plans is a lengthy, and resource-intensive process. The States may not be able to meet the HSWA requirement to adopt and implement a permit program or other system of prior approval within 18 months from promulgation of the revised Criteria if they also must revise their solid waste management plans.

Depending on the outcome of the above issues, the Agency may need to modify the Guidelines for Development and Implementation of State Solid Waste Management Plans (40 CFR Part 256), which delineate the requirements and procedures for State solid waste management plan review. The current Part 256 guidelines comprehensively address program requirements, solid waste management plan submittal procedures, organizational issues, permit programs, legislative and regulatory authorities, and public participation requirements. The Agency may need to modify Part 256 to clearly specify the Agency's evaluation criteria and review procedures for the revised Subtitle D Criteria.

There are two other issues on which the Agency specifically requests comments. The first issue relates to what evaluation criteria the Agency should use to determine the adequacy of State permit programs. One option is for the Agency to base its determination of program adequacy on the content of the State's statutory and regulatory requirements. Under this approach, the Agency would develop evaluation criteria for determining whether these State requirements ensure that the revised Criteria are met.

On the other hand, the Agency could assess State programs on the basis of legislative and regulatory mechanisms together with an evaluation of program effectiveness. This review would include an assessment of the State's past performance (i.e., enforcement, permitting) in managing solid waste disposal activities. In particular, the Agency would consider State resource and technical capabilities in evaluating State program adequacy.

The second issue concerns the extent of public participation that should be provided for in the Agency's review of State program adequacy. The Agency is soliciting comments on whether there should be opportunities for public review and comment on the Agency's evaluation of the adequacy of State solid waste permitting programs or other aspects of the State's solid waste management plan. While the Agency recognizes that such participation opportunities may significantly extend the review period, EPA nevertheless is interested in providing such opportunities when appropriate. EPA will publish a more specific proposal addressing these issues at a later date.

C. Enforcement of the Revised Criteria

States that have adopted the revised Criteria under State law may enforce them in accordance with State authorities. Under today's proposal, there would be no authority for EPA enforcement of the revised Criteria until, 18 months after the date of promulgation of the revised Criteria, the Agency determines that a State's program is inadequate. Also, citizens would be precluded from enforcing the revised Criteria via citizen suits until the Criteria become effective.

1. Citizen Suits

As with the Part 257 Criteria, citizens may seek enforcement of the Part 258 revised Criteria (independently of any State program for their enforcement) by means of citizen suits. The citizen suit provisions of RCRA contained in section 7002 provide an important mechanism for ensuring compliance with the requirements of the statute and its implementing regulations. They authorize individuals, environmental groups, and local governments, among others, to bring legal actions for noncompliance with RCRA requirements. Thus, once the revised Criteria become effective, they have the full force of law and may constitute the basis for citizen enforcement actions against facilities that fail to comply. Citizens would be able to bring actions against facilities for failure to comply with the Criteria and actions against States for failure to develop and implement permit or other prior approval programs as required by RCRA section 4005.

2. Federal Enforcement

Section 4005(c)(2) of RCRA, as amended by HSWA in 1984, provides authority for EPA enforcement of the revised Criteria under authority of sections 3007 and 3008 of Subtitle C. This provision is significant in that it represents the first authority for EPA enforcement of regulatory requirements under Subtitle D. According to section 4005(c)(2), EPA enforcement is contingent on an EPA determination that a State has not adopted an adequate permit or other prior approval program to ensure the compliance of facilities with the revised Criteria by 18 months from the date of promulgation of the revised Criteria. Having made this determination, EPA may use the inspection and enforcement authorities under sections 3007 and 3008 to enforce against facilities failing to comply with the revised Criteria. Disposal of solid waste at facilities that do not comply with the revised Criteria constitutes open dumping. These authorities provide EPA with the necessary tools to enforce Subtitle D's prohibition against open dumping.

EPA expects the States to assume the primary responsibility for implementing and enforcing the revised Criteria, and a major EPA enforcement program for Subtitle D is not envisioned. If States fail to assume their responsibility with respect to the revised Criteria, however, EPA may step in to ensure compliance with Part 258 as necessary to protect human health and the environment. As explained above, EPA is soliciting comments on the criteria and procedures that it should use to determine whether a State has adopted an adequate program.

EPA has determined that it is necessary to formulate an enforcement strategy with respect to the revised Criteria and welcomes public comment on the overall role of EPA enforcement under Subtitle D, the proper elements of an enforcement policy for ensuring compliance with the revised Criteria, and strategies for targeting MSWLFs that pose the greatest threat to human health and the environment. EPA is soliciting public comment on the specific circumstances and situations of facility noncompliance with the revised Criteria that should precipitate direct EPA enforcement actions. In addition, the Agency is particularly interested in comments on circumstances under which the Agency should act to enforce criteria once the Administrator has determined that the State's program is inadequate pursuant to section 4005(c)(1)(C).

D. Other Implementation Issues

1. Implementation Strategy

In conjunction with the development of this rule, the Agency is preparing an implementation strategy. This strategy will serve as a planning document for EPA and the States in understanding what actions are necessary to modify the management of their regulatory programs to accommodate the revised Criteria. This strategy is designed to limit future implementation problems by anticipating potential problems or obstacles and crafting implementation options to resolve or minimize these issues before they emerge.

The Agency currently is identifying implementation issues and needs concerning permitting, compliance monitoring, and enforcement activities; public education and outreach activities; guidance and training needs; resource needs; and EPA/State roles and responsibilities. In particular, the Agency requests comments on the following implementation concerns: (1) What types of education-outreach programs are needed for State and local officials, the regulated community, and the general public? (2) In what areas is there a need for guidance and training? What types of technical assistance activities are needed? (3) What is an appropriate and practical EPA role if the States do not adopt and implement the revised Criteria?

The Agency also solicits comment on whether additional issues should be considered in developing this strategy.

2. Co-disposal of Sewage Sludge

One of the major disposal practices for sewage sludge is disposal at a municipal solid waste landfill. Approximately 6,800 POTWs dispose of their sewage sludge in this manner. By promulgating the Part 258 requirements jointly under RCRA and CWA section 405, questions arise as to the extent to which the Part 258 criteria would be implemented through NPDES permits issued to POTWs. Under RCRA Subtitle D (section 4005(c)), the Part 258 criteria are to be imposed by States on the owner or operator of an MSWLF. States are to impose the criteria by a system of prior approval and conditions, such as issuance of a permit to the MSWLF. The Agency has selected this approach to reconcile the two programs in a way that would minimize duplicative regulation while best ensuring complete coverage under both statutes. This approach would be consistent with section 1006(b) of RCRA, which requires EPA to integrate the provisions of RCRA for purposes of administration and enforcement, and to avoid duplication to the maximum extent practicable, with the appropriate provisions of the CWA and other environmental laws administered by EPA.

Under this proposal, the Part 258 criteria applicable to the characteristics of sewage sludge that must be met if sewage sludge is placed in an MSWLF would be implemented through permits issued to POTWs pursuant to section 405(f) of the CWA. The Part 258 criteria applicable to the landfill site would be implemented under the RCRA Subtitle D program. This would mean that the POTW permit would prohibit the disposal in an MSWLF of sludge found to be hazardous (§ 258.20), and would require that the sludge pass the Paint Filter Liquids Test (§ 258.28). The POTW permit also would prohibit the POTW from sending its sludge to MSWLFs that are not in compliance with the applicable Federal and State regulations. Thus, to obtain a permit authorizing disposal of sludge at a landfill, the POTW would have to ascertain that the MSWLF either has a permit under Part 258 or otherwise is authorized to operate as an MSWLF by the State in which it exists, as prescribed by RCRA.

EPA believes that this implementation scheme fulfills the goals and policies of both RCRA and the CWA and is a rational way to reconcile overlapping programs. EPA also considered separate implementation of the Part 258 criteria under each program. Under the sludge management program of the CWA, this method would involve implementation of all Part 258 criteria, including those applicable to location, design, and operation of the landfill, through permits issued to the POTWs. The Agency decided against this approach for two reasons. First, it would establish duplicative coverage without apparent corresponding environmental benefits. Typically, sewage constitutes a small proportion of the wastes disposed at an MSWLF. Compared to other wastes sent to an MSWLF, such as household hazardous waste and hazardous waste from very small quantity generators, sewage sludge is unlikely to be the source of environmental problems at the landfill. In fact, the presence of sewage sludge in a co-disposal facility may even improve the quality of the leachate at least in the short run (Ref. 15). Second, holding POTWs liable for compliance by the landfill with the Part 258 standards may not be appropriate because other solid waste contributors are not similarly held liable.

EPA invites comment on whether the approach proposed here is an appropriate and effective means to ensure proper management of sewage sludge disposed of in a landfill.

XI. Regulatory Requirements

A. Executive Order No. 12291

1. Purpose

The Agency estimated the costs, benefits, and economic impacts of today's proposed rule. These analyses are required for "major" regulations as defined by Executive Order No. 12291. The Agency also is required under the Regulatory FLexibility Act to assess small business impacts resulting from the proposed rule. The cost and economic impact analyses also are a measure of the "practicable capability" of facilities to comply with the proposed rule.

The cost, benefit, and economic impact results indicate that today's rule is a "major" regulation and it would likely impose differential impacts on a significant number of small entities. This section of the preamble discusses the results of the analyses of the proposed rule as detailed in the draft Regulatory Impact Analysis of Proposed Revisions to Subtitle D Criteria for Municipal Solid Waste Landfills. The draft RIA is available in the public docket. This rule was submitted to the Office of Management and Budget (OMB) for review as required by E.O. No. 12291.

2. Regulatory Alternatives

E.O. No. 12291 requires EPA to estimate the costs and benefits for the proposed rule as well as any viable alternatives. Several current provisions (e.g., performance standards for existing units, post-closure care, ground-water monitoring parameters) of the proposed rule do not exactly reflect what was analyzed in the RIA. For this reason, the results presented in this section and the RIA may understate the fraction of existing landfills requiring more stringent covers (and the resulting costs of these covers), overstate costs for post-closure care, and understate the sampling costs for ground-water monitoring. Nonetheless, the Agency believes the basic conclusions of the draft RIA are accurate estimators of the effects of the proposed rule.

In addition to the proposed rule, EPA analyzed the effects of three regulatory alternatives in the RIA. The analysis of the regulatory options provides a comparison of the proposed rule in the context of other regulatory scenarios. The alternatives predominantly differ with respect to the stringency and uniformity of the containment and cover requirements. Corrective action (the benefits of which currently are modeled for new units only) and extended post-closure care are required for all regulatory options.

Alternative 1 consists of a uniform set of technology-based requirements that are imposed on all MSWLFs irrespective of location or migration potential. This alternative has the most stringent design requirements and essentially reflects the Subtitle C regulations for land disposal. New units are required to have a double composite containment system (i.e., two synthetic liners over a clay liner) with two LCSs and a composite cover. New and existing units are required to close with a composite cover. Ground-water monitoring (as detailed in Subpart F of 40 CFR Part 264), gas monitoring, run-on and run-off controls, and exclusion plan for nonmunicipal solid waste, corrective action, and extended post-closure care are required for both new and existing units under this regulatory alternative.

Alternative 2 requires cover and containment designs based on the migration potential at the site. This categorical approach is described in Section D of this preamble. General facility standards are identical to those for the proposed rule. Corrective action and extended post-closure care are required for all units.

Alternative 3 imposes ground-water monitoring, corrective action, and extended post-closure care on both new and existing units. This alternative is similar to the statutory minimum described under Section D of this preamble except that location standards are not analyzed.

Costs, economic impacts, and risk estimates (including resource damage) are presented in this section for the proposal and the three regulatory alternatives; primary emphasis will be on results for the proposed rule.

3. Cost Analysis

a. Methodology. The Agency developed an engineering cost model to estimate total costs for an MSWLF under a variety of technical and regulatory scenarios. This model estimates the cost to design, construct, operate, close, and provide post-closure care for an MSWLF. The model allows for user-specified input variables such as waste throughput, operating life, type and depth of fill operation, number of phases of construction, containment and cover systems, waste density, environmental monitoring and control, post-closure care, and a variety of unit costs and fees for construction and operation of the facility. Based on these inputs, the model calculates the necessary landfill dimensions (e.g., active area), capital costs, operating and maintenance costs, closure costs, and post-closure costs of the facility. In addition, the model assigns these costs to specific years of the operating life and post-closure care and then calcualtes a present value (in 1986 dollars) based on a 3 percent real disocunt rate. The model can estimate costs for any landfill size between 10 and 1,500 TPD. National costs for a given option then are calcualted using these unit costs and a size distribution of MSWLFs.

EPA selected a limited number of generic user inputs to the model and held these constant across the regulatory options so that cost differences in the environmental controls would be highlighted. EPA selected seven model facility sizes for modeling costs. Preliminary results form the Subtitle D Solid Waste (Municipal) Landfill Survey (referred to here as the Facility Survey) were used to assign a frequency distribution to each size category. The seven model sizes used (and the assigned frequency of MSWLFs) are: 10 TPD (51.4 percent), 25 TPD (16.9 percent), 75 TPD (12.7 percent), 175 TPD (7.1 percent), 375 TPD (6.5 percent), 750 TPD (3.2 percent), and 1,500 TPD (2.3 percent). (Although the 1,500 TPD category includes only 2.3 percent of all MSWLFs, these facilities handle 36.5 percent of all waste.) EPA assumed for the cost analysis that all MSWLFs opertate in one phase and use a cut-and-fill method of operation.

EPA estimated corrective action costs separately using the failure and release component of the risk model (described in Section X1.A.4 of this section). EPA's approach to estimating corrective action costs partially reflects the flexibility of this requirement in the proposed rule. EPA estimated costs based on aggessive cleanup of new contamination and either aggressive or passive cleanup of existing plumes. This approach to estimating corrective action costs was used for all regulatory alternatives in addition to the proposed rule.

For new contamination, EPA modeled the effects of ground-water recovery wells as the selected corrective action technology. The recovery wells are assumed to be installed one year after the corrective action has been triggered.

For existing contamination, EPA estimated corrective action costs for two types of responses. The first response consists of active restoration of the plume using ground-water recovery wells (i.e., the approach modeled for new facilities). EPA assumed that this approach will be utilized for larger plume sizes as the most effective remedial measure. To partially account for the flexibility provided by the corrective action requirement in terms of the timing and response to contaminant plumes, the second response represents a passive approach for smaller plumes. EPA assumed that this passive approach would consist of providing an alternative water supply to affected user of the gound water. EPA recongizes that alternative technologies or remedies may be employed for cleanup of affected ground water. Corrective action costs were added to the design and operating costs to derive total costs for a given regulatory option.

To obtain incremental regulatory costs, EPA first characterized MSWLF baseline practices. Baseline practices are those design and operating practices that exist prior to the imposition of the requirements in today's proposed rule. EPA characterized baseline conditions using preliminary results from the Facility Survey and results from the State Census. For purposes of this analysis (including the economic impact and risk analyses discussed later), EPA characterized the baseline facility as an unlined landfill with a vegetative cover at closure, no environmental monitoring, no post-closure care, and no corrective action. However, as described below, EPA adjusted compliance costs to account for existing State requirements with respect to liners, leachate collection systems, and ground-water monitoring well requirements. The MSWLF population is extremely diverse in terms of its technical characteristics (e.g., presence of environmental controls, design capacity, remaining life), which is due in part to a broad range of State requirements that vary in both scope and detail. EPA reviewed the State requirements to identify those States that require containment (i.e., liners, leachate collection systems) and ground-water monitoring well requirements that would likely satisfy the conditions in today's proposed rule. EPA identified 22 States with similar liner and LCS requirements and 24 States that have similar ground-water monitoring well requirements. EPA adjusted the regulatory compliance cost estimates for facilities in these States. The adjustment for State liner and leachate collection system requirements was made only for analyzing the costs of the proposed rule; the costs for all regulatory options accounted for the existence of State requirements for ground-water monitoring wells. To the extent that other existing State requirements are similar to those in today's proposed rule, the estimated compliance costs will be overstated. Although EPA adjusted the national compliance cost estimates to reflect these State requirements, the risk and resource damage estimates were not adjusted to reflect the presence of containment systems in the baseline. The benefits of the regulatory options in protecting ground water as a drinking water source (presented in this section and in the RIA) will likely be overstated by not incorporating the presence of these State requirements; however, EPA has not analyzed the benefits of the regulatory options in reducing risk from other routes of exposure (e.g., surface water, subsurface gas, risks to the ecosystem). Therefore, the net benefits of the rule will likely be understated.

The Agency estimated compliance costs for each Facility Survey respondent. EPA assigned each respondent a weighting factor that represents the frequency of that type of facility in the total national regulated population of 6,034 active MSWLFs. The weighting factors were used to scale respondent facility costs up to national compliance costs for the regulatory options. EPA estimated compliance costs separately for new and existing requirements. In addition, EPA combined the new and existing MSWLF estimates to produce a compliance cost figure that represents an average cost for existing units and their new replacement landfills. New landfills are assumed to be perpetually replaced for this combined estimate.

For new MSWLFs, all regulatory costs are assumed to apply from the time construction begins. A new landfill is assumed to operate for 20 years and compliance costs (in present value terms) are annualized over this time period. For those facilities with longer operating lives (approximately 60 percent of all MSWLFs as reported in the Facility Survey), the annualized costs will be lower due to an increased amortization period for capital costs.

For existing MSWLFs, the regulatory costs are applied over the remaining operating life as reported in the Facility Survey. (Existing MSWLFs that were reported in the Facility Survey to be closing before the effective date of the proposed rule were not assigned existing requirement costs. These landfills were assumed to be replaced with new facilities to which appropriate requirements were applied.) EPA annualized the regulatory costs for an existing MSWLF over the remaining life of the facility. EPA assumed that revenues are generated to pay for regulatory costs during the operating life. Although this is likely to be true for private landfills, publicly owned facilities may have the option of passing on the costs (for facilities with short remaining lives) to future facilities and thus reduce the cost impact. Existing landfill costs will tend to be overstated for these facilities that amortize the costs over a period that extends past the reported remaining life.

To develop a combined estimate of average annualized compliance costs for the regulatory options, costs for existing units plus their new replacement landfills have been discounted to one present value that spans the existing landfill's remaining life plus the ongoing life of a new landfill that is replaced every 20 years. (Replacement of all existing MSWLFs with new MSWLFs does not account for the current trend away from siting new landfills; moreover, it is unlikely that each of the existing 6,034 MSWLFs will have a replacement landfill in perpetuity. Regionalization, recycling, shifts to resource recovery, and better siting of landfills in "good" locations will result in fewer new MSWLFs than estimated in this analysis. EPA has not incorporated these factors into the analysis because they involve simulating site-specific local decisions that are difficult to analyze. EPA's costs will tend to be overstated by not including these factors.) EPA assumed that the new MSWLF would be built at the same location such that the required designs remain the same. EPA then annualized this present value as a perpetuity to obtain an annualized combined compliance cost estimate for a given regulatory option. Although this figure does not represent the actual cash flow (i.e., for capital outlays) that would likely result from regulation, it does represent a level annual payment as if the facility operator had borrowed funds to pay the capital costs. This annualized combined cost estimate is used in the economic impact analysis of the regulatory options. Compliance costs specific to new and existing requirements are presented in detail in the RIA; however, costs (and economic impacts) presented in this section of the preamble only reflect the combined estimates.

For the proposed rule, EPA estimated the effect of the design goal on new MSWLFs by analyzing the baseline risks (a detailed discussion of the risk methodology is presented later in this section). For the purposes of this analysis, EPA assumes all MSWLFs would comply with a design goal of 10^{-5} from the allowable protective range of 10^{-4} to 10^{-7}. Actual costs (and benefits) of the proposed rule will vary depending on the state-selected design goal. Landfills with an average most exposed individual risk below 1×10^{-5} in the baseline (i.e., unlined with a vegetative cover) were excluded from any further design requirements. EPA estimated that these facilities would not trigger corrective action since risks at these units would never exceed the 1×10^{-5} trigger level used for this regulatory analysis.

Those new facilities that exceeded a 1×10^{-5} risk level in the baseline then were modeled with a synthetic cover. EPA assigned these facilities a synthetic cover if risks were reduced to below 1×10^{-5}. For the subset of facilities that still exceeded the design goal, EPA assigned a synthetic containment system with leachate collection and a synthetic cover. Those landfills that still exceeded the risk threshold with this more stringent design would trigger corrective action. EPA selected these designs for the purpose of conducting this analysis. These designs are neither specifically required by the proposed rule nor do they represent the only designs that could satisfy the performance standard; however, the chosen designs do represent features that would be applicable and effective in a wide range of environmental settings.

EPA only assigned liners and leachate collection systems to new units: no lateral expansion was assumed to occur at existing facilities so that covers would be the only applicable design requirement to meet the performance standard. Under the proposed rule, existing units must have a cover that prevents infiltration. In the RIA, EPA assigned a vegetative cover if baseline risks were less than 1×10^{-5}; for the subset of facilities that exceeded this baseline risk level, EPA assigned a synthetic cover. Other cover systems besides these two modeled in the RIA could be used to comply with the performance standard. EPA moedled the proposed rule at one design goal (1×10^{-5}) and two POCs: The waste unit management boundary (modeled as the 10-meter POC) and the maximum allowed alternative boundary of 150-meters (the 150-meter POC).

For compliance at the 10-meter POC, EPA estimated that 61 percent of the MSWLFs would require an unlined unit with a vegetative cover design, 11 percent an unlined unit with a synthetic cover, and the remaining 28 percent a synthetic liner with leachate collection and a synthetic cover. At the 150-meter POC, EPA estimated the resulting percentages as 79, 9, and 13 percent, respectively. In addition to the design requirements necessary to achieve the design goal, EPA assigned compliance costs to both new and existing units for the general facility standards and other requirements. These requirements include: Developing procedures for excluding hazardous waste from the landfill, monitoring for methane in the subsurface and in structures, run-on and run-off controls, developing and implementing a closure plan, and ground-water monitoring. Although EPA modeled an extended post-closure care period (including cover and slope maintenance, cover inspection, and ground-water monitoring) the proposal requires a two-phased post-closure care period at a minimum of 30 years. In addition, the ground-water monitoring parameters modeled in the RIA differ from those under the proposed rule. EPA did not estimate costs for financial responsibility requirements. Detailed discussion on how EPA estimated compliance costs for these requirements is provided in the RIA.

Under the proposed rule, States may take into account the resource value of ground-water supplies when determining ground-water monitoring requirements. EPA assumed in this cost analysis that ground-water monitoring systems include one upgradient (three-well) cluster and a number of downgradient clusters that vary with the length of the downgradient boundary (e.g., four clusters for a 10 TPD MSWLF, 20 clusters for a 1,500 TPD facility). EPA assumed that ground-water monitoring would be conducted on a semiannual basis. For existing MSWLFs, the ground-water monitoring requirements were phased in over five years. Under the proposed rule, States may vary the number of wells, frequency of monitoring, and timing of ground-water monitoring implementation. To the extent that actual ground-water monitoring requirements specified by the States differ from what was modeled in this analysis, the actual compliance costs will vary from those estimated by EPA.

Alternative 1 imposes uniform standards on all MSWLFs. Existing unit requirements are the same as for new units except that the containment and LCS requirements were not assigned. Ground-water monitoring is not phased in, and the Phase II list of parameters under the proposed rule is used as the list of constituents for which all units must monitor. EPA assigned a composite cover to all new and existing units (similar to that described in 40 CFR 264.310) and a double composite containment system with two LCSs (similar to that described in 40 CFR 264.301) to all new units. EPA assumed that clay for the cover and containment systems was obtained off site unless the survey respondent reported that clay or sandy clay was available at the facility.

Alternative 2 represents a categorical approach, based on location, to determine the necessary containment and cover requirements. This categorical approach is described in Section IX.D of this preamble. Landfills are assigned designs based on the local climate and hydrological factors that control the potential for leachate contamination (i.e., the migration potential at the site).

To estimate the effects of Alternative 2, EPA used respondent-supplied data on location, primary soil type, saturated permeability, and porosity to determine the distribution of MSWLFs across the four location categories. EPA used the location data to assign an annual precipitation figure obtained from the nearest National Weather Station. The annual cutoff value for high and low precipitation under Alternative 2 is 40 inches. To determine the split between short and long time-of-travel, the Agency used either a saturated time-of-travel equation or an alternative equation (a wetting-front approach) depending on whether the site was reported to be in a saturated environment. The cutoff for short versus long time-of-travel is the greater the active life or 20 years. Using this approach, the Agency estimates that the percentages of all MSWLFs in location Categories I, II, III, and IV are 29.2 percent, 5.8 percent, 37.8 percent, and 27.2 percent, respectively.

Cover and containment requirements, which are performance-based for Alternative 2, were assessed for each survey respondent as described below. Alternative 2 requires facilities to use a water-balance method to select the proper cover that will minimize infiltration through the cover at any time in the future. There are several measures that the facility owner or operator could undertake to meet this performance standard if the vegetative cover by itself is not sufficient. For example, in order to minimize infiltration, the owner or operator could vary the type of vegetation to increase the evapotranspiration, vary the slope of the cover to increase run-off, use heavier soils from off site, or install a clay or synthetic layer with a drainage collection system beneath the vegetative cover. These decisions involve site-specific factors and are difficult to analyze. Thus, EPA limited the options for cover type to either vegetative or synthetic. EPA assumed that MSWLFs with positive annual net precipitation (precipitation minus potential evapotranspiration) will use a synthetic cover. EPA assumed that landfills with zero or negative net precipitation use the same cover design that was simulated for the baseline, except that the cost includes additional fees for quality assurance. (Potential evapotranspiration was determined using the Thornwaithe-Mather equation.) Using this approach, EPA estimates that 67 percent of all MSWLFs have positive net precipitation and thus are assigned synthetic covers; the remaining 33 percent are assumed to achieve the performance standard with vegetative covers. EPA applied costs for these covers to both new and existing units.

Alternative 2 assumes that all MSWLFs in location Categories II and IV (34 percent of all facilities) must have a leachate collection system; units in location Categories I and III must collect leachate if more than one foot of leachate is generated over the active life. The Agency determined the leachate generation for Facility Survey respondents in Categories I and III using the approach described in EPA publication 530/SW-168. The Agency estimates that 63 percent of the landfills in these two categories (or 41 percent of all facilities) would need an LCS. Thus, across all MSWLFs, the Agency estimates that 75 percent will be required to have an LCS.

Under Alternative 2, the need for a containment system for MSWLFs in location Categories I and II only is related to the need for an LCS since they already have a long time-of-travel. A containment system is necessary if the native soil does not have a sufficiently low permeability to allow the LCS to function properly. EPA assumed that MSWLFs in these categories that need an LCS and that reported clay as their primary natural soil type in the Facility Survey do not need a liner (estimated as 10 percent of all MSWLFs). EPA assigned the remaining units (four percent of all facilities) that need an LCS in these categories a synthetic liner so that the LCS would perform efficiently.

MSWLFs in Categories III and IV that need an LCS (estimated as 61 percent of all facilities) also must have a containment system that will increase the time of travel to greater than the active life or 20 years. Although a clay liner could possibly meet the performance standards, EPA assigned a synthetic liner, which would be less expensive in most cases, to these units.

MSWLFs that do not need an LCS (estimated as 25 percent of all MSWLFs) are all in Categories I and III. Those facilities that are in Category I (20 percent of all MSWLFs) have a long time of travel, and thus do not need a liner. For those in Category III (five percent of all MSWLFs), EPA assigned a two-foot thick clay liner that should provide sufficient delay to meet the performance standard. Moreover, even if clay had to be brought from off site, a clay liner is less expensive than synthetic given that a synthetic liner would also require installation of a leachate collection system.

Although these assignments of designs to meet the performance standards for Alternative 2 do not reflect the inherent flexibility of performance requirements, EPA believes that they do provide an indication of how these standards would be met. The general facility standard requirements (and resulting compliance costs) for Alternative 2 are identical to those analyzed for the proposed rule.

Alternative 3 consists of uniform criteria applied to both new and existing landfills. This regulatory alternative is similar to the statutory minimum mandated under HSWA and includes analysis of ground-water monitoring (throughout an extended post-closure care period) and corrective action requirements; however, EPA has not incorporated any location standards into the analysis for this alternative. Alternative 3 is the only regulatory option that does not include general facility standards. EPA assumed that ground-water monitoring would begin on the effective date of the regulation. A more detailed discussion of the cost analysis for each of the regulatory options is included in the RIA.

b. Cost Results. The Agency estimates that the proposed rule will result in an annualized cost of approximately $880.0 million at the 10-meter POC and $691.4 million at the 150-meter POC. Thus, based on the $100 million annual cost threshold established in E.O. 12291, today's proposal is a "major" regulation.

Table 3 shows the size distribution of MSWLFs across the seven facility sizes modeled in the cost analysis, as well as the annualized cost of the proposed rule for each facility size. EPA estimates that the smallest size category (i.e., 10 TPD), while accounting for 51.3 percent of all MSWLFs, only accounts for 6-percent and 7-percent of the total cost of the proposed rule under the 10-meter and 150-meter POCs, respectively. The two largest size categories modeled (750 and 1,500 TPD) account for only 5.7 percent of all MSWLFs, but 35 percent to 38 percent of the total cost under either POC.

TABLE 3.—ANNUALIZED COMBINED COST BY SIZE, PROPOSED RULE

[Dollars in millions]

Size category (TPD)	Percentage of all MSWLFs	Annualized cost	150-meter POC
		10-meter POC	
10	51.3	$52.3	$47.3
25	17.0	65.8	72.2
75	13.1	134.0	107.6
175	7.3	128.5	95.6
375	5.5	148.7	130.3
750	3.1	137.3	93.4
1,500	2.6	193.4	145.0
Total	[1] 100.0	880.0	691.4

[1] Does not add due to rounding.

EPA estimates that, under the 10-meter (150-meter) POC, approximately 46.7 percent (52.5 percent for the 150-meter POC) of all MSWLFs will incur an incremental cost increase of less than $10 per ton; 49.2 percent (45 percent for 150-meter POC) face an increase between $10 and $25 per ton, and 4.8 percent (1.4 percent for 150-meter POC) will incur a compliance cost between $25 and $50 per ton. Under the 150-meter POC, EPA estimates that 1.2 percent of all MSWLFs will incur cost increases of greater than 50 percent per ton due to expensive corrective actions that are triggered.

Table 4 shows the total annualized combined costs for today's proposed rule and the three regulatory alternatives. The annualized costs, including corrective action, range from $419 million for Alternative 3 up to $3,341 million for Alternative 1. The costs for the proposed rule, under either POC, falls near the lower end of the range. Corrective action is triggered under all the regulatory options and represents from 2-percent (under Alternative 1) to 72 percent (under Alternative 3) of the total costs. Corrective action represents 11 percent and 19 percent of the total cost of the proposed rule for the 10-meter and 150-meter POCs, respectively. The relative costs across options are affected by the stringency of the requirements only, since the facility size distribution and the range of remaining lives are constant across all regulatory scenarios. The wide range in contribution of corrective action costs across the options reflects the reactive or preventive nature of a given regulatory scenario. Alternative 3, representing a reactive approach to releases, has the largest percentage of corrective action costs to total costs among the regulatory options.

TABLE 4.—TOTAL ANNUALIZED COSTS FOR REGULATORY SCENARIOS

[Dollars in millions]

Regulatory scenario	No corrective action	Including corrective action
Proposal:		
10-meter POC	$782.2	$880.0
150-meter POC	562.0	691.0
Alternative 1	3,268.6	3,341.0
Alternative 2	1,336.9	1,426.9
Alternative 3	117.1	419.4

Table 5 presents the incremental cost per ton for the regulatory scenarios. The median, minimum, and maximum estimates are shown for each option.

TABLE 5.—ANNUALIZED INCREMENTAL COSTS PER TON BY OPTION

	Proposal		Alt. 1	Alt. 2	Alt. 3
	10-meter POC	150-meter POC			
Median	$11.01	$9.54	$47.58	$15.62	$5.17
Maximum	40.61	81.39	106.11	48.38	54.45
Minimum	0.76	0.75	4.01	0.75	0.06

4. Economic Impact Analysis

a. Methodology. Preliminary results from the Facility Survey indicate that 80 percent of all MSWLFs are owned by local governments (e.g., counties, cities, towns, villages). These governments will incur the initial costs and impacts attributable to the revised Criteria; however, ultimately the governments will likely pass on the regulatory costs to their citizens and to other governments that also may use the landfill. The compliance costs will be passed on in the form of increased taxes or fees or decreased services of other types if the community is operating under tight budgetary constraints. Thus, local citizens (the households that use the landfills to dispose of their wastes) will eventually pay the increased costs of landfill operation. The Agency assessed these short- and long-term impacts in a two-phase economic impact analysis. In the first phase, the ability of governmental entities to pay for the regulatory costs was assessed. The second phase was an assessment of the ability of citizens to pay for the increased compliance costs.

The first phase, an assessment of impacts on local governments, consisted of two components. First, the cost of compliance was reviewed relative to the overall financial capability of the community. Financial capability (or financial health) was determined from the "1982 Census of Governments" and the "1983 County and City Data Book." These data bases represent the most recent available and complete information on local government finances (as government censuses are conducted every five years). As described in the RIA, the Agency assessed financial capability by developing a composite score. The score categorizes communities' financial capabilities as weak, average, or strong.

The financial capability score of a community will not change significantly due to compliance costs from the imposition of the proposed rule because many of the indicators used to develop the score are not directly affected by increased operating expenditures. In addition, it would not be appropriate to presuppose the reaction of a community to higher landfill costs. Some communities will increase taxes while others will reallocate available funds to meet the regulatory burden. In the area of debt impact, it also is not clear how a given project will be financed. Many communities will use pay-as-you-go financing as they always have, others will incur debt, and the remainder will turn to private contractors who will raise their own capital.

The development and categorization of the composite score is described in detail in the RIA. The economic impact analysis results presented in this section of the Preamble focus on comparisons of compliance costs to government and demographic indicators as described below.

The second component of the community impact analysis consisted of calculating compliance costs as a percentage of total current community expenditures (CPE) and comparing this ratio to a threshold level. The CPE indicator serves as a convenient summary of the local government's ability to pay.

The second phase of the economic impact analysis consisted of comparing compliance costs to the ability of citizens to pay. This comparison is appropriate because, ultimately, the burden will fall on the citizens, regardless of whether the local government pays for the increased MSWLF costs by increasing taxes, reducing other services, increasing debt levels, or turning to private contractors. EPA has assessed the absolute impact in terms of total cost per household (CPH). EPA has measured the relative impact using costs as a percentage of median household income (CPMHI). Both CPH and CPMHI are compared to selected threshold levels. When combined, these various analyses produce an overall indication of the significance of municipal economic impacts for specific regulatory options.

For this analysis, the Agency selected threshold levels to identify high impacts for the three primary economic measures (i.e., CPE, CPH, CPMHI). For CPE, preliminary results from the Facility Survey indicate that municipal solid waste disposal costs average approximately 0.5 percent of communities' total expenditures. In comparison to other municipal services, costs at this level represent a very small obligation. Data from the "1982 Census of Governments" indicate that the average community spends 36 percent of its total budget on education, 5-percent of its total budget for police protection, 3-percent for sewage disposal, 2-percent for fire protection, and 1-percent for sanitation services other than sewage (including solid waste collection and disposal and street cleaning). Based on these data, the Agency established a threshold for identifying high impacts as one percent of compliance costs relative to total community expenditures.

The Agency used two threshold levels to assess the severity of costs per household. An incremental regulatory cost of $100 per household per year was selected as a threshold for moderate impacts. Although this cost represents a large percentage increase in many households' disposal costs, it represents a relatively small absolute charge. An annual threshold of $220 per household was used to identify severe impacts. This threshold level is equivalent to one percent of the median household income of all the communities in the country according to the "1983 City and County Data Book."

The Agency has previously selected a threshold level for costs as a percentage of median household income under the Construction Grants Program. The criteria ranged from one percent of median household income for low-income communities to 1.75 percent of MHI for high-income communities. The Agency selected one percent in this analysis to identify a high impact level for CPMHI.

b. Economic Impact Results. Table 6 shows the percentage of communities under each regulatory scenario that have compliance costs exceeding one percent of total current community expenditures, the percentage of all people that reside in these communities, and the maximum CPE under each option.

TABLE 6.—COSTS AS PERCENTAGE OF EXPENDITURES

[Regulatory Options]

Regulatory scenario	Percent of communities with CPE>1%	Percent of people with CPE>1%	Maximum CPE (percent)
Proposal: 10-meter POC	16	7	4.0
Proposal: 150-meter POC	11	4	5.3
Alternative 1	68	34	14.0
Alternative 2	33	12	6.3
Alternative 3	10	3	8.6

EPA estimates that greater than one-half of all communities under Alternative 1 have CPE exceeding one percent. Under Alternative 2, 33 percent of all governmental entities have CPEs that fall in this category. The percentage of municipalities with costs above 1-percent of current expenditures under the proposal is much lower: 16 percent and 11 percent, given the 10-meter POC and 150-meter POC, respectively. Because most of these severely-impacted communities are small, the percentage of the total U.S. population that resides in these communities is much smaller than the percentage of communities affected (as shown in Table 6).

Several factors will tend to mitigate the actual impact of the alternatives on communities with high CPE. One important factor is the relatively small proportion of the municipal budget that is usually devoted to municipal solid waste disposal. Although CPE greater than 1-percent indicates that municipal solid waste disposal expenditures may double in many communities, after regulation these expenditures will still represent less than 2-percent of the total municipal budget in most communities. Although it may be difficult for communities to cope with large percentage increases in municipal solid waste disposal costs in the short run, once the initial adjustment is made, these costs should be easier for communities to absorb because they comprise a very small portion of communities' total budgets.

Table 7 shows the average CPH across the entire nation, maximum CPH, and percentage of all communities with costs per household exceeding $100 per year (the moderate impact level). The Agency estimates that average incremental CPH across the entire nation ranges from $5 under Alternative 3 to $40 under Alternative 1. For the proposal, EPA estimates that the average CPH is $11 at the 10-meter POC and $8 at 150-meter POC.

TABLE 7.—AVERAGE COST PER HOUSEHOLD PER YEAR

(Regulatory Options)

Regulatory scenario	Average CPH	Percent of communities with CPH < $100 (percent)	Maximum CPH
Proposal: 10-meter POC	$11	0.2	$119
Proposal: 150-meter POC	8	2.1	253
Alternative 1	40	23.5	335
Alternative 2	17	0.1	160
Alternative 3	5	0.2	178

EPA has selected, for this analysis, a threshold level for severe impacts on households of $220 per year. The Agency estimates that this threshold is exceeded under Alternative 1 and at the 150-meter POC for the proposal, but only by fewer than 0.1 percent of all communities in both cases. When the $100 per year threshold is considered, EPA estimates that, for all regulatory options except Alternative 1, the percentage of communities that exceed this level is low (i.e., less than 3-percent). However, under Alternative 1, EPA estimates that 23.5 percent of all communities experience increases in CPH of greater than $100 per year.

Cost per household as a percentage of MHI is relatively low across all of the regulatory options. The Agency estimates that the 1-percent threshold level is exceeded under the proposal at the 150-meter POC and under Alternative 1. Even under these regulatory options, fewer than 2-percent of all households fall into the high impact-category (0.1 percent exceed the threshold at the 150-meter POC and 1.1 percent for Alternative 1). EPA estimates that the maximum CPMHI is 1.3 percent under the proposal at the 150-meter POC and 1.7 percent under Alternative 1.

Impacts on households also depend on who owns the landfill that serves those households. Table 8 indicates the number of communities and landfills by each major ownership category—county, city, village or town, private, and other. (The other category covers landfills owned by nonlocal governments including special districts, States, and the Federal government.) The distribution of communities by ownership type looks somewhat different than the distribution of landfills by ownership type because county-owned and private landfills tend to serve a larger number of communities than city or town landfills. The table indicates that communities served by village or town landfills have much higher CPH than average. These landfills tend to serve only one or two communities and are commonly very small, thus the CPH is higher. Communities served by private landfills tend to have lower than average CPH. These landfills usually serve many communities and, on average, are larger than publicly owned landfills. Smaller communities could reduce the regulatory burden by participating in larger regional landfills.

TABLE 8.—NUMBER OF COMMUNITIES AND LANDFILLS BY TYPE OF OWNER

[Average Community CPH for Proposed Rule]

Owner	Communities		Landfills		Average number of communities per landfill	Average Community CPH	
	Number	Percent	Number	Percent		Fed POC	State POC
County	10,618	37	1,760	29	6.0	$18	$13
City	6,622	23	1,743	29	3.8	16	15
Village or Town	2,115	7	1,182	20	1.8	34	31
Private	8,556	30	912	15	9.4	10	10
Other	1,087	4	427	8	2.6	15	15
Total	28,998 [b]	100 [a]	6,024 [b]	100 [a]	4.8	$16	$14

[a] Totals may not add to 100 percent because of rounding.

[b] Data are missing for 10 landfills in 19 communities.

As stated previously, the costs used in the economic impact analysis represent a reasonable upper-bound estimate. Several opportunities exist for communities to reduce the regulatory burden: Regionalization to share the economies of scale at larger landfills, shifts to resource recovery facilities, increases in the rate of recycling to reduce the waste volume for disposal, and better siting of new MSWLFs in "good" locations. (As explained above, EPA has not incorporated these mitigating factors into the analysis because they involve site-specific local decisions that are difficult to predict.)

5. Risk Assessment

a. Methodology. The Subtitle D MSWLF universe consists of a diverse group of facilities that occur in a wide variety of environmental settings. Hundreds of factors affect the nature, extent, and severity of environmental impacts from these facilities. To identify and evaluate some of the most important factors, EPA developed the Subtitle D Disk Model. This model couples information from case studies and other sources with a series of mathematical formulations of engineering, physiochemical, hydrologic, toxicologic, and socioeconomic processes that govern impacts to provide a framework that allows evaluation of regulatory options.

Although the Subtitle D Risk Model has been neither peer reviewed nor verified, EPA has used it in its preliminary form to help analyze: (1) Problems associated with Subtitle D facilities under the current set of Criteria (i.e., baseline), (2) estimates of the level of risk reduction available from preventive measures (liners, leachate collection systems and covers), and (3) remedial measures (corrective action) under various regulatory options. For each regulatory alternative, risk and resource damage has been modeled in hundreds of scenarios that represent unique combinations of landfill size and design, environmental setting, and exposure distance. EPA has estimated the frequency for which each scenario occurs in the total population of MSWLFs and weighted the results for each scenario reflect the frequency of occurrence. The following is an overview of the risk model.

(1) The Subtitle D Risk Model. The Subtitle D Risk Model provides: (1) An analytic framework for estimating human health risk reduction and other benefits of regulatory options, (2) a direct link between estimates of benefits and costs of regulations, and (3) scenarios that contain different combinations of design, waste, environment, and response. The model builds directly on the Subtitle C Liner Location Risk and Cost Analysis Model (Ref. 20), and has adopted many of its basic characteristics. It is a dynamic model. For this analysis, EPA simulated 100 years of leachate release and 200 years of gound-water transport for each year's release. Environmental fate and transport and dose-response relationships are modeled as deterministic processes, while containment system failure and some hydrologic events are considered stochastic phenomena. The model only assesses effects on ground water as the environmental medium of concern: ecosystem risks and subsurface gas and surface water pathways (which also would contribute to risk) are not analyzed. Some parameters can be varied over a wide range; for others, the user selects from specified, generic values.

The model includes a series of submodels that simulate pollutant release (liner failure and leachate quality submodels), fate and transport (unsaturated zone and saturated zone transport submodels), exposure, impacts (dose-response and resource damage submodels), and corrective action. Following are brief summaries of each of these submodels.

(a) Pollutant Release. The Agency used Monte Carlo simulation in the failure/release submodel to estimate the probability and time of failure (defined as release to the unsaturated zone) for MSWLFs and to estimate the quantity of leachate released. The submodel uses a fault tree structure that traces each possible failure event from all possible combinations of basic events (e.g., liner failure, infiltration of liquid) that could combine to cause failure. Each of these basic events is assumed to occur at random, following specified probability distributions. The model provides distributions of the year of failure and the release rate. EPA used the model to simulate the performance of several combinations of containment and cover systems in eight environmental settings.

The leachate quality submodel simulates the concentrations of chemical constituents in leachate released from the MSWLF between years 1 and 100. Given differences in the leaching behavior of constituents, the submodel utilizes three different modeling approaches to simulate the concentrations of inorganics, biodegradable organics, and synthetic organics in leachate. The submodel applies the appropriate algorithm to calculate the concentration of each leachate constituent for each year. The concentration then is combined with the release volume calculated by the failure/release submodel to calculate the mass flux of the constituent across the landfill/subgrade boundary.

One representative leachate, consisting of eight constituents of concern (COC), was simulated. This leachate is intended to represent typical leachates generated from co-disposal of municipal solid waste, nonhazardous industrial waste, and VSQG hazardous waste. EPA selected the COC based on analyzing limited leachate data from only 44 operating MSWLFs. The COC were selected based on potential for causing human health risk or resource damage given their observed median concentrations in municipal solid waste leachate, toxicity to humans, regulatory limits under SDWA taste and odor thresholds, and mobility and persistence in the subsurface environment. The eight COC and the effect of concern for each are given below:

Constituent	Criterion effect
Vinyl chloride	Human health risk (cancer).
Arsenic	Human health risk (cancer).
Iron	Resource damage (taste and odor).
1,1,2,2, - tetrachloroethane.	Human health risk (cancer).
Dichloromethane	Human health risk (cancer).
Antimony	Human health risk (systemic).
Carbon tetrachloride	Human health risk (cancer).
Phenol	Rsource damage (taste and odor).

(b) Fate and Transport. Subsurface transport modeling addresses transport through both the unsaturated zone and the saturated zone. The Subtitle D Risk Model uses the McWhorter-Nelson wetting front equation to calculate the delay between the time of failure and the time that contaminants reach an underlying aquifer. The mass that breaks through the unsaturated zone then disperses through the ground water. Using an adaptation of the Random-Walk Solute Transport Model (Ref. 25) developed by Prickett, Naymik, and Londquist, the saturated zone model simulates downgradient ground-water concentrations over time.

To model the transport of constituents, EPA developed eight environmental settings consisting of four net infiltration regimes (0.25-inch, 1-inch, 10-inch, and 20-inch) and two categories of ground-water depths (deep and shallow). These two parameters are important in affecting the release rate of leachate to the unsaturated zone and ultimately the aquifer. Net infiltration represents the amount of water that can enter the landfill as a result of precipitation. Ground-water table depth represents the potential for pollutant attenuation and degradation to occur in the unsaturated zone. In addition, for facilities that are seasonally inundated with ground water, the inundation depth determines the rate at which ground water can flow through the waste.

EPA performed a statistical analysis of USGS data for each infiltration category to determine the mean depth to ground water and the average annual ground-water fluctuation. Shallow and deep water table depths are represented by the 50th and 90th percentiles, respectively.

For transport through the saturated zone, EPA developed 11 generic ground-water flow fields to represent the range of hydrogeologic conditions in the United States. The flow fields are based on data collected from ground-water supply reports for each of the USGS regions. The flow fields vary in terms of aquifer configuration, materials, and flow velocity. Five of the flow fields are single-layer aquifer systems, two contain two adjacent aquifers, three consist of an aquifer overlaid with a nonaquifer, and one contains two aquifers separated by a nonaquifer.

EPA assigned each surveyed landfill to a net infiltration region based on its precipitation level (obtained from the nearest National Weather Station) and other climatic data. Each of these MSWLFs also was assigned a DRASTIC (Ref. 39) setting to select appropriate ground-water table depths and flow fields. These assignments were used to develop a frequency distribution for each environmental setting. EPA used these frequency weights to scale up the risk model results to obtain national estimates.

(c) Exposure Distance and Populations. EPA selected seven well distances for modeling risk: 10 meters, 60 meters, 200 meters, 400 meters, 600 meters, 1,000 meters, and 1,500 meters. Preliminary results from the Facility Survey were used to develop a frequency distribution of distance from the MSWLF to the closest drinking water well at each site. This distribution (i.e., distance to closest well) was used to estimate risk to the maximum exposed individual (MEI). Approximately 54 percent of the MSWLFs were reported to have no downgradient drinking water well within one mile of the facility. For the other 46 percent of MSWLFs: 12.8 percent reported wells within 300 meters, 22.5 percent reported wells within 500 meters, and 40.3 percent reported wells within 1,250 meters of the facility boundary.

EPA used the preliminary Facility Survey data on distance to all wells within one mile downgradient and the number of people served at each well to calculate the total population risk (i.e., number of predicted cancer cases). EPA calculated the mean number of well-using people per acre (i.e., 1.6) using facility survey results for private and/or public wells. The land area associated with each exposure well was multiplied by this population density to estimate the size of the exposed population for each affected well.

Ground-water concentrations of chemical constituents released from landfills can cause human exposure via drinking water. All exposed individuals are assumed to weigh 70 kilograms and drink two liters of water per day. The lifetime dose is calculated as the running 70-year average over an individual's lifetime.

(d) Impacts: Human Health Risk. For this analysis, reported risk is the average lifetime maximum exposed individual risk (i.e., the mean of the average lifetime (70-year) risks over the 300-year modeling period).

Of the eight COC selected for modeling human health risk, five are carcinogens and one is a noncarcinogen. The approach for estimating risks for carcinogenic effects is consistent with the Agency's cancer risk assessment guidelines. Carcinogenic potencies are from the Agency's Carcinogenic Assessment Group (i.e., 95th percentile upper-bound slopes based on a linearized multistage model).

For noncarcinogenic effects, the Weilbull equation was used with a threshold to predict a probability of effect. Below the threshold, risk equals zero. At doses above the threshold, risk depends on the dose, the constituent-specific threshold, and the shape of the dose-response curve.

(e) Impacts: Resource Damage. The measure of resource damage in the model is based on the cost to replace contaminated ground water that currently is used, or may be used, for drinking water. Resource damage is determined by plume area, the density of drinking water wells, the source of replacement water and its distance from the affected wells, the time the plume first appears, and whether ground water currently is used.

The Agency assumed that the replacement source is nearby ground water located one mile distant. The replacement well system was designed using the mean population density of 1.6 people per acre that also was used for the human health risk estimates.

Resource damage was estimated under two scenarios: use value and option value. Use value assumes that the population currently is using the ground water, whereas option value is used when the population is not currently using the resource but may wish to do so in the future. For option value, the resource damage measure recognizes the probabilistic nature of future use; replacement costs are multiplied by an estimated probability of use in each time period. The present value for both option and use value is then determined at a 3-percent real discount rate.

(f) Corrective Action. Under the proposed rule, corrective action can be triggered if a constituent of concern is detected in the uppermost aquifer at levels exceeding the applicable MCL; if an MCL does not exist, a risk-based or background level is used as the standard.

In the corrective action analysis for this RIA, ground-water monitoring wells are located at the POC, which can vary between the landfill unit and the property boundary depending on the regulatory scenario. EPA estimated the effects of corrective action based on detection of constituents of concern in the uppermost aquifer at levels exceeding a 1×10^{-5} risk level.

As stated in the cost methodology, only ground-water recovery wells were modeled as the corrective action technology. The submodel assumes that the corrective action technology is in place one year after the trigger levels are reached and operates at its specified efficiency for the remainder of the modeling period. The model calculates downgradient well concentration profiles following implementation of the corrective action and recalculates risk and resource damage estimates. These results are compared to the estimates calculated for the baseline (i.e., no corrective action scenario) to determine the reductions in risk and resource damage achieved by corrective action.

(2) Risk Model Inputs. EPA modeled three MSWLF sizes for risk and resource damage: 10 TPD, 175 TPD, and 750 TPD. Each size category is characterized by the total volume of waste placed in the landfill, the number of phases used to dispose of the waste, and the dimensions of the landfill at capacity (e.g., surface area, depth, height). The waste volumes and dimensions for each capacity category are consistent with

the cost model described earlier. The number of phases in the risk analysis are 2, 5, and 10 for the 10, 175, and 750 TPD landfills, respectively.

As with the cost model, EPA used the Facility Survey to estimate the frequency with which each landfill size category occurs nationwide. Landfills with capacities of up to 30 TPD are included in the 10 TPD category, 30 to 500 TPD landfills are in the 175 TPD units, and those with larger capacities are modeled as 750 TPD. Using this approach, 61.5 percent of the landfills were modeled at 10 TPD, 33.1 percent as 175 TPD, and 5.5 percent as 750 TPD. The Agency assumed that facility size is independent of hydrogeologic and exposure attributes.

All new MSWLFs are assumed to operate for 20 years. The baseline facility is the same as that used in the cost analysis but risks and resource damage estimates (for the proposal) were not adjusted to reflect existing State requirements for containment systems. This adjustment for liners and leachate collection systems would affect no more than 17 percent of all MSWLFs. To assess the effectiveness of a regulatory option, EPA assumed that a new landfill is constructed at the same site and operated for 20 years plus post-closure care according to the applicable requirements.

Under the proposed option, MSWLF units are required to meet a performance standard by applying appropriate cover and containment designs. Owners or operators have the freedom to choose the type of design they think will meet the performance standard. Because the performance and costs of design elements such as liners and covers are highly dependent on site-specific factors, there are likely to be several types of designs (and combinations of designs) chosen by the regulated community to comply with the performance standard.

As stated previously, to analyze the proposed rule, EPA assigned containment and cover designs to new MSWLFs according to a 10^{-5} design goal (chosen from the allowable protective range of 1×10^{-4} to 1×10^{-7}). In addition, EPA assigned one of three containment and cover designs under the assumption that owners or operators will use the least stringent design capable of meeting the design goal (EPA recognizes that other control technologies beyond the three analyzed could be used to comply with the performance standard). If the most stringent of the three designs did not reduce risk to this level, corrective action would be triggered.

Landfills with average lifetime risks below 1×10^{-5} given the baseline design (unlined with a vegetative cover) were excluded from further design requirements. Landfills with higher risks were assigned a synthetic cover and, if risks for an MSWLF unit still exceeded the design goal, the most stringent design of a synthetic liner, synthetic cover, and leachate collection system was assigned. For existing facilities, EPA used the baseline risks with a 1×10^{-5} cutoff to assign either a synthetic cover (for those with greater than 1×10^{-5} baseline risks) or a vegetative cover (for those with less than 1×10^{-5} baseline risks).

For this analysis, EPA assumed that extended care continues for 80 years after the end of the active life of the MSWLF, and includes maintenance of the vegetative portion of the cover, ground-water monitoring, and corrective action (although an extended care period is analyzed in the RIA, the actual proposed rule requires a two-phased post-closure care period of at least 30 years). For designs with synthetic covers, EPA assumed that the synthetic components would be maintained and replaced if necessary until the end of the first 30 years of post-closure care.

EPA modeled Alternatives 1 through 3 in a manner consistent with the cost analysis. A detailed discussion on how EPA estimated risk and resource damage for the regulatory alternatives is included in the RIA.

b. Risk Results. This part presents results of the risk analysis (including resource damage) for the baseline and each of the regulatory options.

(1) Baseline. For the baseline, EPA estimates that average MEI risks over the 300-year modeling period range from approximately 1×10^{-4} to zero. Results from the Facility Survey indicate that about 54 percent of landfills have no drinking water wells within one mile of the facility boundary. Because the model only estimates human health risks at drinking water wells within one mile of the facility, EPA assigned these facilities (54 percent of all MSWLFs) no human health risk. EPA recognizes that if future wells are located near existing landfills, this subgroup (54 percent) of all MSWLFs would face potential risks in the baseline from contaminated ground water similar to those that currently have nearby wells. Another 6 percent have nearby wells, but have no risk (MEI less than or equal to 1×10^{-10}) because no constituents reach the wells within the modeling period. Risks are low (1×10^{-6} to 1×10^{-8}) or very low (less than 1×10^{-8}) for a total of 82.8 percent of MSWLFs (these MSWLFs include the 54 percent of all facilities) that have no drinking water wells within one mile and, therefore, have an assigned zero health risk). Of the remainder, 11.6 percent have moderate risk (i.e., in the 1×10^{-6} to 1×10^{-5} range), 5.5 percent have high risk (1×10^{-5} to 1×10^{-4}), and a negligible 0.05 percent exceed 1×10^{-4}. Across all units in the baseline, less than 20 percent have risks greater than 1×10^{-6}. EPA recognizes that future increases in well density near MSWLFs would increase baseline risks from those estimated.

The principal constituents contributing to the risk estimates from the model are vinyl chloride, 1,1,2,2-tetrachloroethane, and dichloromethane (methylene chloride). These risk (and resource damage) estimates are based on observed median concentrations. The Agency estimates that the risk associated with the 90th percentile levels in the leachate data would be about one order of magnitude higher than that simulated for the median concentrations. This risk occurs because carcinogens are the primary contributors to risk in this analysis, cancer risk varies linearly with dose, and the reported 90th percentile concentrations are about one order of magnitude higher than the median levels. The leachate data on which these risk estimates are made are extremely limited. Therefore, the risk estimates could change significantly with more comprehensive leachate data.

The Agency estimates that 0.0770 cancer cases per year in the baseline can be expected over the 300-year modeling period. EPA has only estimated risks from drinking ground water, and, therefore, additional risks would exist from other routes of exposure (e.g., surface water, subsurface gas, and ecosystem risk). Risks attributable to existing contamination also are not considered.

Moreover, if future wells are located near existing MSWLFs (or new sites are located near current wells), the overall risk distribution will reflect the estimates for the subset of landfills that currently have wells within one mile of the facility boundary. For this subgroup of the population, nearly 40 percent of landfills have risks exceeding 1×10^{-6}. In addition, the median risk is about 4.3×10^{-7}.

EPA performed a sensitivity analysis of the baseline risk results to the well distance distribution. When all landfills are assumed to have wells at the facility boundary (modeled as 10 meters downgradient from the waste unit boundary for this sensitivity analysis) risk changes dramatically. While less than 20 percent of all MSWLFs have risks exceeding 1×10^{-6} for the actual well distribution, over 67 percent exceed this risk level when all exposure is assumed to occur at the 10-meter boundary.

The results of the analysis identify several factors that are important in determining risk, namely facility size, distance to nearest well, and environmental setting. These factors interact with many others in a complex manner to produce risk.

Higher levels of contamination and, thus, higher risks are associated with larger facilities that have a greater mass of waste. The high percentage of small facilities (less than 30 tons per day) in the regulated universe tends to weigh the overall distribution to lower risk levels. However, the Agency's economic impact results indicate that smaller communities will have incentive to regionalize their landfill operations in order to share the burden of cost increases with other communities as well as to take advantage of the economies of scale associated with larger facilities. Regionalization would shift the overall risk distribution towards the higher risks associated with larger facilities, although the total number of facilities would be reduced.

All other factors held constant, risk decreases with increasing distance from the facility. Contaminant concentrations diminish over distance due to degradation, dispersion, and attenuation. While the closest wells present the greatest risk, results from the Facility Survey indicate that this occurrence is relatively rare: 54 percent of existing MSWLFs have no wells within one mile, 15 percent have wells within 300 meters, and 25 percent have wells within 500 meters. However, as stated above, the proximity of wells to MSWLFs likely will increase in the future and thus baseline risks and the risk reduction attributable to the proposal would be greater than the estimates based on the current well distribution.

Wetter climates are associated with higher release volumes and consequently greater risks. However, because landfills are almost equally likely to be found in wet or arid climates, no one infiltration rate setting has a dominant influence on the overall risk distribution. Hydrogeologic characteristics of the aquifer also exert a strong influence on risk. Aquifer properties affect the extent of dilution of the leachate and the retardation and degradation of specific pollutants. Aquifers with slow velocities (i.e., one meter per year) generally allow for no pollutant breakthrough at the more distant wells and for considerable pollutant degradation before breakthrough at nearby wells. In the high-velocity flow fields (i.e., 1,000 and 10,000 meters per year), considerably more water flows through the aquifer, which affords more dilution of the leachate. Intermediate velocity aquifers (i.e., 10 and 100 meters per year) have higher risk profiles because they neither allow for much degradation nor provide for much dilution or pollutant dispersion.

Although these factors (i.e., facility size, distance from the facility, infiltration rate, aquifer characteristics) are strong determinants of risk, no single factor is responsible for most of the variability. All of these factors, plus others that were not accounted for in EPA's risk modeling, interact in a complex manner to produce risk.

(2) Regulatory Options. This Subpart will present first the results for the 10-meter POC modeled at 10 meters from the waste boundary and then the 150-meter POC modeled at 150 meters from the waste boundary.

For the 10-meter POC, EPA estimated that, for about 61 percent of all landfills, vegetative covers alone are sufficient to meet a 1×10^{-5} risk-based performance standard. Synthetic covers are sufficient for 11 percent of the landfills, while synthetic liners with leachate collection systems and synthetic covers are needed at the remaining 28 percent. About 40 percent of the landfills with synthetic liners and covers (11 percent of all landfills) trigger corrective action under the proposal.

About 0.1 percent of the landfills have risks exceeding 1×10^{-5} under the proposal, compared to 5.6 percent in the baseline and about 35 percent have risks between 1×10^{-6} and 1×10^{-5}. Population risks for the proposal are 0.0210 cancer cases per year (over the 300-year modeling period), down from a baseline of 0.0770 cases per year.

At the 150-meter POC, EPA estimated that about 79 percent of the landfills are in compliance with the performance standard in the baseline (compared to 61 percent with the 10-meter POC). About 9 percent need synthetic covers and the remaining 13 percent need synthetic liners and covers. About 5 percent of all landfills trigger corrective action.

As with the 10-meter POC, the number of landfills with risks exceeding 1×10^{-5} is reduced from 5.6 percent in the baseline to about 0.1 percent at the 150-meter POC. About 86 percent of the landfills have risks lower than 1×10^{-6} under this option, compared to 83 percent in the baseline. Population risks are 0.0227 cancer cases per year (over the 300-year modeling period), down from a baseline of 0.0770 cases per year.

Under Alternative 1, less than 1 percent of the MSWLFs have high risk (greater than 1×10^{-5}), compared to 5.6 percent in the baseline. Approximately 6.1 percent have moderate risks (1×10^{-6} to 1×10^{-5}) compared to 11.6 percent in the baseline; 15.2 percent have low risks (1×10^{-8} to 1×10^{-6}); and the remaining 78.7 percent have very low or no risks.

Corrective action is never triggered during the first 50 years under Alternative 1, so all of the risk reduction results from the containment system and cover. Overall, about 9 percent of the landfills trigger corrective action under Alternative 1. The cover reduces the amount of infiltration entering the landfill. Before leachate is released from the MSWLF, both synthetic membranes must fail, and the leachate then must travel through three feet of clay. Due to this delay, which ranges from 52 to over 100 years, some of the pollutant mass that would otherwise have been released is not released during the modeling period. The delay also results in additional pollutant degradation prior to release. The leachate collection systems remove some of the pollutant mass from the landfill.

EPA estimates that population risks under Alternative 1 are 0.0086 cancer cases per year (over the 300-year modeling period), reduced from the estimate of 0.0770 cancer cases per year in the baseline.

Under Alternative 2, risk shifts from the moderate- and high-risk ranges to the low and very low categories. Only 0.03 percent of the landfills have risks exceeding 1×10^{-5}, and 7.9 percent have risks between 1×10^{-6} and 1×10^{-5}, compared to 5.6 and 11.6 percent in the baseline, respectively. The percentage of landfills with risks below 1×10^{-6} increases from about 83 percent in the baseline to about 92 percent under Alternative 2. The expected number of cancer cases under Alternative 2 is 0.0105 per year (over the 300-year modeling period), compared to 0.0770 in the baseline.

Under Alternative 3, 0.003 percent of landfills have risks higher than 1×10^{-4}, and 1.8 percent have risks between 1×10^{-5} and 1×10^{-4}. The percentage with risks between 1×10^{-6} and 1×10^{-5} decreases from 11.6 in the baseline to 8.7 percent under Alternative 3. Population risks under this alternative are 0.0216 cancer cases per year over the 300-year modeling period.

Of all the alternatives considered, EPA believes the proposed rule is likely to effectively reduce risk because of the performance standard nature of the proposal. Risk depends on a complex interaction among site-specific factors. This variability affects not only the occurrence of risk, but also the effectiveness of a particular design. Expressing a regulation in terms of performance allows for the implementation of design and operating procedures that best address site-specific risk factors. Overall, EPA believes that risk is likely to be very low under the proposed option.

Although Alternative 3 requires extended care, it does not require liners or leachate collection systems. With this design, many landfills, particularly those located in the wetter climates, will release leachate to the aquifer during the unit's active life. As a result of these early releases, EPA estimates that corrective action will be triggered more often than under the proposal (39 percent compared to 5 and 11 percent). Because of the uncertainty in the effectiveness of corrective action, risk may be higher under this alternative than estimated in the RIA (this uncertainty, however, is not easily modeled). Alternative 3 represents a reactive approach to potential contamination compared to preventive approaches such as the proposed or Alternative 2, in which landfill design is based in part on achieving a performance standard.

Table 9 shows the number of cancer cases expected annually over the 300-year modeling period, and the reduction in annual population risk for each regulatory option. As estimated by EPA, the reductions in risk are similar among all the regulatory options.

TABLE 9.—PREDICTED POPULATION RISK ACROSS 6,034 NEW MSWLF'S

Regulatory scenario	Cases per year [1]	Reduction (Cases/year)
Baseline	0.0770	
Proposal: 10-meter POC	.0210	0.0560
Proposal: 150-meter POC	.0227	.0543
Alternative 1	.0036	.0659
Alternative 2	.0105	.065
Alternative 3	.0216	.0554

[1] Total population risk over the 300-year simulation period divided by 300.

c. Resource Damage Results. Consistent with the risk analysis, resource damage estimates are made for the baseline, proposed rule, and each regulatory alternative. As discussed in the methodology section, resource damage is measured as the replacement cost (expressed in present value terms) to provide water to users whose supply is contaminated by releases of leachate from MSWLFs. Similar to the risk analysis, EPA has not considered the surface water pathway in the resource damage analysis. Resource damage estimates (modeled for new facilities only) do not take into account existing State requirements for containment systems.

(1) Baseline. The Agency estimates significant resource damage in the baseline for MSWLFs ranging from $0 to more than $4 million. The majority of MSWLFs, however, have resource damages valued at less than $200,000; this result largely reflects the option value estimate for the 54 percent of all MSWLFs that have no drinking water wells within one mile of the facility. EPA predicts that about 29 percent of MSWLFs will have no resource damage. Approximately 31 percent of landfills have resource damage exceeding $200,000, and about 13 percent have resource damage in excess of $1 million. The two components of resource damage are not option value and use value. Because option value is based on the probability that a ground-water source may someday be used, it tends to be much lower than use value for a given set of conditions; option value is estimated to be typically one-tenth of use value. Option value dominates at lower levels of resource damage while use value is the only measure to appear at levels exceeding $400,000.

When both use and option value are considered, the median resource damage is about $79,000. 13-percent of the MSWLFs have damages exceeding $1 million, and 7-percent have damages exceeding $2 million. If only use value is considered, the median estimate for resource damage for this subset of landfills (i.e., the 46 percent of all MSWLFs that report drinking water wells within one mile) is about $485,000, and almost 28 percent of these MSWLFs have damages that exceed $1 million.

The total resource damage for all 6,034 MSWLFs in the baseline is approximately $2.58 billion.

Facility size, distance to nearest well, and environmental setting have an influence on resource damage similar to their influence on the risk estimates presented earlier.

Generally, the resource damage estimates are heavily dependent on the current status of ground-water use, plume size, and the timing of contamination. Because ground water in the vicinity of more than half the MSWLFs is not currently used, most contamination causes resource damage that has relatively low present value. In some cases, however, resource damage can be extensive, valued at as much as $5 million. Environmental factors have an impact on resource damage by affecting plume size and its timing.

(2) Regulatory Options. Resource damage under the proposal reduces the replacement costs from the baseline. Under the proposal at the 10-meter POC, EPA estimates that no landfills will have replacement costs exceeding $3 million (present value), compared to over 3 percent in the baseline. The fraction of landfills with replacement cost between $1 million and $3 million decreases from 9.5 percent in the baseline to 6.5 percent under the proposal. The percentage of landfills with no resource damages is the same for both the baseline and proposal (28.6 percent). EPA estimates that the total resource damage across all landfills is $1.27 billion, a reduction of $1.31 billion from the baseline estimate of $2.58 billion.

Under the proposal at the 150-meter POC, the shift to lower replacement costs is smaller than with the 10-meter POC. Under the 150-meter POC, EPA estimates that there are no landfills with resource damage greater than $3 million. Seven percent have replacement costs between $1 and $3 million, and 64.3 percent have positive resource damage less than $1 million. The total resource damage across all landfills is $1.6 billion, which is $980 million less than the baseline but $33 million more than under the 10-meter POC.

Under Alternative 1, no MSWLFs have replacement costs exceeding $1 million, whereas about 13 percent have replacement costs exceeding $1 million in the baseline. The fraction of MSWLFs with replacement costs between $0.2 million and $1 million decreases from one-fifth to one-tenth under Alternative 1. Over half of the MSWLFs have zero resource damage with Alternative 1 requirements in place, compared to 29 percent in the baseline. The total resource damage across all MSWLFs is $410 million, a reduction of $2.17 billion from the baseline.

The synthetic/composite liner, double leachate collection system, and composite cover reduce resource damage for the same reasons that they reduce risk. As with risk, there is no resource damage estimated in the 0.25-inch net infiltration region because releases do not occur within the first 100 years. If the pollutant release period in the model were extended, it is likely some resource damage would be simulated. None of the reduction in resource damage results from corrective action, which is never triggered during the first 50 years under Alternative 1.

EPA estimates that Alternative 2 effectively reduces resource damage. Virtually none of the landfills have resource damages exceeding $1 million, compared to about 17 percent in the baseline. The percent of landfills with resource damage between $0.2 million and $1 million decreases from 15.1 percent in the baseline to 12.8 percent under Alternative 2. About 35 percent of the landfills have no resource damage. The total resource damage across all landfills decreases from $2.58 billion in the baseline to $570 million under Alternative 2 for a reduction of $2.01 billion.

Alternative 3 eliminates the occurrence of replacement costs higher than $4 million. About 6.4 percent of the landfills have replacement costs between $1 million and $4 million. The number of landfills with no resource damage remains virtually unchanged from the baseline at about 29 percent. The total resource damage across all landfills under Alternative 3 drops from $2.58 billion to $1.57 billion as a result of corrective action.

In summary, all of the regulatory options reduce resource damage from baseline levels. For each option, the largest reductions occur for those facilities that currently have downgradient wells (i.e., resource damage is measured in terms of use value) and install preventive measures to control releases. At these facilities, the reduction and delay in releases to the subsurface reduce plume size and/or delay formation of plumes. Because replacement costs are discounted, delay in plume formation translates directly into reduced resource damage. Those facilities with no current wells have smaller baseline resource damage (measured as option value), but also have proportionately smaller damage reductions because they are not as strongly affected by the delay in leachate release. Table 10 presents the resource damage results, across all 6,034 new MSWLFs, for the regulatory options.

TABLE 10.—TOTAL RESOURCE DAMAGES FOR 6,034 NEW FACILITIES

[Present value in billions of dollars]

Regulatory scenario	Resource damage	Damage reduction
Baseline	$2.58	
Proposal (10-meter POC)	1.27	$1.31
Proposal (150-State POC)	1.60	0.98
Alternative 1	0.41	2.17
Alternative 2	0.57	2.01
Alternative 3	1.57	1.01

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal regulatory agencies to evaluate the impacts of regulations on small entities. The RFA requires an initial screening analysis to determine whether the proposed rule will have a significant impact on a substantial number of small entities.

This section presents the methodology and results of the Agency's screening analysis for the proposed rule at the 10-meter point of compliance.

1. Methodology

The RFA provides some guidance in developing definitions of what constitutes a substantial number of small entities, what size criteria define a small entity, and what is a significant impact, although it allows the Agency to develop a more appropriate definition if necessary. The Act defines a "substantial number" as more than 20 percent of the affected population of small entities. The RFA provides a definition of a small governmental entity as any government serving a population of less than 50,000.

The RFA allows for several indicators (e.g., compliance costs as a percentage of production costs, compliance costs as a percentage of sales, number and proportion of small entities likely to close) to be used to assess significant impacts. When a recommended threshold is exceeded for a given indicator, this constitutes a "significant impact."

For this RFA screening analysis, the Agency used the same measures and threshold levels as those used in the economic impact analysis. These indicators (and the corresponding threshold values) are cost as a percentage of expenditures (1-percent), cost per household ($220 per year), and cost as a percentage of median household income (1-percent).

2. Results

As stated in the economic impact analysis results, the threshold values are never exceeded for CPH or at the 10-meter POC for the proposed rule. Tables 11 and 12 present data on cost per household and cost as a percentage of expenditures for the proposed rule at the 10-meter POC. (The pattern of impacts is very similar for costs as a percentage of median household income and is not displayed.) The two indicators show similar patterns of impact with the greatest impacts on communities with populations of 5,000 or less. The threshold value for significant impact is exceeded for the cost as a percentage of expenditures indicator.

TABLE 11.—COST PER HOUSEHOLD PER YEAR FOR PROPOSED RULE (10-METER POC)

[Percent of households by community size]

Population size	CPH range (in percent)			>$100
	<$25	$25-$50	$50-$100	
Less than 1,000	72.9	25.2	1.9	0.0
1,001-5,000	80.6	15.9	3.1	0.3
5,001-15,000	87.5	10.8	1.7	0.0
15,001-50,000	88.9	9.9	1.1	0.0
50,001-100,000	88.5	11.5	0.0	0.0
More than 100,000	98.0	2.0	0.0	0.0

TABLE 12.—COMPLIANCE COST AS PERCENTAGE OF EXPENDITURES FOR PROPOSED RULE (10-METER POC)

[Percent of communities by community size]

Population size	Percent of expenditures		
	0-1%	1-2%	>2%
Less than 1,000	78.8	18.9	2.3
1,001 to 5,000	85.6	10.5	4.0
5,001 to 15,000	90.0	7.8	2.2
15,001 to 50,000	90.9	5.6	3.6
50,001 to 100,000	87.7	12.3	0.0
Greater than 100,000	100.0	0.0	0.0

Although the RFA is aimed primarily at mitigating adverse effects on small businesses, it also includes a definition of small governmental entities as any government serving a population of less than 50,000. The municipal data base of primary providers of local government services used for this analysis contains about 29,017 entities, 97.6 percent of these represent a population of 50,000 or smaller. Because such a large proportion of affected entities under the proposed rule meets the 50,000 population criterion suggested in the RFA, and since significant adverse impacts are less on entities with a population larger than 5,000, an alternative definition of a small entity is appropriate. There are 22,191 entities in the data base with populations of 5,000 or less; this represents 77 percent of the total. The proposed regulation will have its most severe impacts on governments serving less than 1,000 people, which include 46 percent of primary local governments. Therefore, the Agency determined that an appropriate size definition for small entities for the purpose of this analysis falls somewhere between governments of 5,000 persons and 1,000 persons.

The Agency determined that the proposed rule is likely to impose differential economic impacts, although not significant impacts, on a substantial number of small entities. The impacts are more severe on small governments than those on larger communities. The Agency determined that the effects of the proposed rule on small entities should be analyzed in greater detail as part of the final rulemaking effort.

C. Limitations

There are several important caveats to the results presented in this section. Costs and benefits for the proposed rule as estimated in the RIA represent a 1×10^{-5} design goal, actual effects of the proposal will vary as the State-specified-design goal varies within the allowable protective range of 1×10^{-4} to 1×10^{-7}. Moreover, other designs besides the three modeled in the RIA would be sufficient to meet the performance standard and would influence the resulting costs and benefits. Although several provisions (e.g., post-closure care, ground-water monitoring parameters, performance standard for existing units) of the proposal do not exactly reflect what was analyzed in the RIA, the Agency believes that the basic conclusions of the RIA are accurate estimators of the effects of the proposed rule.

Compliance costs represent upper-bound estimates. Factors that may act to reduce the cost estimates including regionalization, waste shifts to resource recovery facilities, recycling, and better siting of new landfills in "good" locations. As noted earlier, EPA has not incorporated these factors into the analysis because they involve site-specific local decisions that are difficult to analyze.

It is unlikely that each of the existing MSWLFs will have a replacement landfill in perpetuity as EPA has assumed in this analysis due to such forces as regionalization. Smaller MSWLFs can achieve substantial economies of scale that will help to reduce their compliance costs by participating in larger regional landfills with other local governments. The economies of scale likely will remain positive even with additional costs due to transfer stations and increased transportation distances. Although these economies of scale exist, there are many local, noneconomic (e.g., political, technical) factors that enter into landfill siting that may inhibit the forces of regionalization.

Future waste shifts to resource recovery facilities will divert the waste volume that potentially needs to be landfilled, and, thus, costs presented in this section will tend to be overstated. It is likely that solid waste combustion will become more attractive in the future due to competitive costs with landfilling or favorable environmental conditions at a given site. EPA has estimated that resource recovery could divert as much as 18 percent of the solid waste stream away from land disposal given future population growth and increases in the volume of solid waste generated (Ref. 16). Alternatives to land disposal other than energy recovery also exist (e.g., recycling, composting). These programs, although often successful due to their inherent flexibility and cost-effectiveness, have historically diverted only modest amounts of municipal solid waste from the waste stream.

EPA has adjusted the compliance costs to reflect State requirements for liners, leachate collection systems, and ground-water monitoring wells; no adjustment was made in the benefits analysis, which used an unlined unit with a vegetative cover to represent baseline conditions. Estimated costs may be overstated for landfills in States with other requirements that may be similar to the proposed rule.

There are also several caveats related to the risk analysis. There is considerable uncertainty in the risk modeling. The model components that introduce the most uncertainty are those that predict: (1) Leachate quality for trace organics, (2) the probability and consequences of containment system failure, (3) the effectiveness of corrective action, and (4) the human health risk resulting from exposure to toxic substances (i.e., the dose-response models).

The risk analysis also considers only the current population that is using the ground water as a drinking water source. In the future, greater numbers of people and wells may be located near MSWLFs. Future population growth would increase the risk reduction estimates presented in this discussion. If regionalization occurs so that the total number of landfills that needs to be sited is reduced, the total exposed population may also be reduced. However, EPA has shown that larger risks are associated with larger facilities. Future population growth, and a corresponding increase in solid waste generation that may be land disposed, will also increase compliance costs over the current estimates.

EPA estimated only risks that are attributable to drinking contaminated ground water. Other risks from MSWLFs were not analyzed (e.g., surface water, subsurface gas, risks to the ecosystem). Analyzing these risks would result in greater risk reduction than currently estimated. The aggregate costs already include some of the controls that would prevent these other forms of risk. The bulk of the compliance costs are for requirements that serve to protect the ground water from leachate contamination.

EPA's modeling period in the risk analysis is 300 years. Greater risk reduction would be obtained if this period were extended.

Many assumptions, such as those discussed above, enter into the risk analysis. Thus, strong reliance on the absolute risk estimates without full realization of the limitations of the analysis should be avoided. Comparisons of the risk estimates across regulatory options are more reliable and valid than absolute estimates for a single option. EPA solicits comments and additional data regarding the assumptions, costs, risks, and potential impacts identified in the regulatory analysis.

D. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* Submit comments on these requirements to the Office of Information and Regulatory Affairs; OMB; 726 Jackson Place, NW; Washington, D.C. 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements.

XII. References

A. Background Documents

(1) *U.S. EPA, OSW.* Notification Requirements for Industrial Solid Waste Disposal Facilities—Criteria for Classification of Solid Waste Disposal Facilities and Practices (40 CFR Part 257)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). August 1988 (draft).

(2) *U.S. EPA, OSW.* Location Restrictions (Subpart B)—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft).

(3) *U.S. EPA, OSW.* Operating Criteria (Subpart C)—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft).

(4) *U.S. EPA, OSW.* Closure/Post-Closure Care and Financial Responsibility Requirements (Subpart C, §§ 258.30–258.32)—Criteria for Municipal Solid Waste Landfills (40 CFR

Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft).

(5) *U.S. EPA, OSW.* Design Criteria (Subpart D)—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft).

(6) *U.S. EPA, OSW.* Ground-Water Monitoring and Corrective Action (Subpart E)—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988.

(7) *U.S. EPA, OSW.* Case Studies on Ground-Water and Surface Water Contamination from Municipal Solid Waste Landfills—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988 (draft).

(8) *U.S. EPA, OSW.* Summary of Data on Municipal Solid Waste Landfill Leachate Characteristics—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988.

(9) *U.S. EPA, OSW.* Updated Review of Selected Provisions of State Solid Waste Regulations—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). July 1988.

B. Regulatory Impact Analysis

(10) *U.S. EPA, OSW.* Draft Regulatory Impact Analysis (RIA) of Proposed Revisions to Subtitle D Criteria for Municipal Solid Waste Landfills—Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)—Subtitle D of the Resource Conservation and Recovery Act (RCRA). August 1988.

C. Guidance Documents

(11) *U.S. EPA, OSW.* Criteria for Identifying Areas of Vulnerable Hydrogeology Under the Resource Conservation and Recovery Act, Statutory Interpretative Guidance, Guidance Manual for Hazardous Waste Land Treatment, Storage, and Disposal Facilities, Interim Final. July 1986.

(12) *U.S. EPA, OSW.* Guidance Document on Classifying Solid Waste Disposal Facilities, SW-828. March 1980.

(13) *U.S. EPA, OSW.* Permit Writers' Guidance Manual for Hazardous Waste Land Storage and Disposal Facilities, Phase I Criteria for Location Acceptability and Existing Applicable Regulations, final draft. February 1985.

D. Other References

(14) *Abt Associates Inc.* National Small Quantity Generator Survey. Contract No. 68-01-6892. U.S. Environmental Protection Agency, Office of Solid Waste, Washington, DC 1985.

(15) *Farrell, J. B. and G. K. Dotson.* "The Effects of Municipal Wastewater Sludge on Leachates and Gas Production From Sludge-Refuse Landfills. U.S. EPA/ORD. 1987.

(16) *Franklin Associates, Ltd.* Characterization of Municipal Solid Waste in the United States, 1960 to 2000. U.S. Environmental Protection Agency, Washington, DC June 1986.

(17) *Franklin Associates, Ltd.* Characterization of Municipal Solid Waste in the United States, 1960 to 2000. (1988 Update) U.S. Environmental Protection Agency, Washington, DC. March 1988.

(18) *GCA Corporation and Booz, Allen & Hamilton Inc.* Review of Federal and State Regulations and Other Information on Disposal of Solid Waste in Wetlands. Contract No. 68-01-6871. U.S. Environmental Protection Agency, Washington, DC December 1986.

(19) *ICF Incorporated.* Case Studies of State Financial Responsibility Programs for Subtitle D Solid Waste Disposal Facilities (Draft). March 1987.

(20) *ICF Incorporated.* The Liner Location Risk and Cost Analysis Model: Phase II. (Draft) 1986.

(21) *ICF Incorporated.* Survey of State Closure and Post-Closure Regulations For Solid Waste Facilities. (Draft). May 1987.

(22) *PEI Associates, Inc.* State Subtitle D Regulations on Solid Waste Landfills, Surface Impoundments, Land Application Units and Waste Piles. Contract No. 68-01-7075/02-3890. U.S. Environmental Protection Agency, Washington, DC 1986.

(23) *Planning Research Corporation.* Evaluation of NPL/Subtitle D Landfill Data. U.S. Environmental Protection Agency, Washington, DC. May 1986.

(24) *Pohland, F. G. and F. R. Harper.* Critical Review and Summary of Leachate and Gas Production From Landfills. August 1986.

(25) *Random-Walk Solute Transport Model for Selected Ground Water Quality Evaluations, 1981.* Bulletin No. 65, Illinois State Water Survey.

(26) *Science Applications International Corporation.* Summary of Data on Industrial Nonhazardous Waste Disposal Practices. Contract No. 68-01-7050, U.S. Environmental Protection Agency, Washington, DC 1985.

(27) *SCS Engineers.* A Survey of Household Hazardous Wastes and Related Collection Programs. Contract No. 68-01-6621. U.S. Environmental Protection Agency, Washington, DC October 1986.

(28) *U.S. EPA, OSW.* Subtitle D Study Phase I Report, EPA/530-SW-86-054. October 1986.

(29) *U.S. EPA, OSW.* Industrial Subtitle D Facility Study, List of Questions in Telephone Survey. September 1986.

(30) *U.S. EPA, OSW.* Survey of Solid Waste (Municipal) Landfill Facilities. August 1986.

(31) *U.S. EPA, OSWER.* Understanding the Small Quantity Generator Hazardous Waste Rules: A Handbook for Small Business. September 1986.

(32) *U.S. EPA, OSW.* Notification of Hazardous Waste Activity, Form 8700-12 and Instructions. Revised November 1985.

(33) *U.S. EPA.* EPA Journal, Vol 12, No. 1. January/February 1986.

(34) *U.S. EPA, OSW.* Test Methods for Evaluating Solid Waste Physical/Chemical Methods (SW-846). September 1986.

(35) *U.S. EPA, OSW.* Water Balance Method for Predicting Leachate Generation from Solid Waste Disposal Sites. EPA publication number 530/SW-168. 1975.

(36) *U.S. EPA, OSW.* Lining of Waste Impoundment and Disposal Facilities (SW-870). 1983.

(37) *U.S. EPA, OWPO, "Financial Capability Guidebook." February 1983.*

(38) *WESTAT, Inc.* Census of State and Territorial Subtitle D Nonhazardous Waste Programs. Contract No. 68-01-7047. U.S. Environmental Protection Agency, Washington, DC 1986.

(39) *U.S. EPA, OGWP.* DRASTIC: A Standardized System for Evaluating Ground-Water Pollution Potential Using Hydrogeologic Settings, EPA/600/2-85/018. 1985.

(40) *U.S. EPA, OSW.* Process Design Manual—Municipal Sludge Landfills. EPA—625/1-78-010. October 1978.

XIII. List of Subjects

A. 40 CFR Part 257

Reporting and record keeping requirements, Waste disposal.

B. 40 CFR Part 258

Reporting and record keeping requirements, Household hazardous waste, Waste disposal, Security measures, Water pollution control, Liquids in landfills, Small quantity generators, Corrective action, Liner requirements.

Date: August 23, 1988.

Lee M. Thomas,

Administrator.

For reasons set out in the preamble, Title 40 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 257—CRITERIA FOR CLASSIFICATION OF SOLID WASTE DISPOSAL FACILITIES AND PRACTICES

1. The authority citation is revised to read as follows:

Authority: 42 U.S.C. 6907(a)(3), 6944(a) and 6949a(c), 33 U.S.C. 1345 (d) and (e).

2. Section 257.1 is amended by adding paragraph (c)(10) to read as follows:

§ 257.1 Scope and purpose.

* * * * *

(c) * * *

(10) The criteria of this part do not apply to municipal solid waste landfills, which are subject to the revised criteria contained in Part 258 of this title.

* * * * *

3. Section 257.2 is amended by revising the definition for "facility," and adding definitions in alphabetical order for "construction/demolition waste," "industrial solid waste," "industrial solid waste disposal facility," "land application unit," "landfill," "municipal solid waste landfill," "surface impoundment," and "waste pile" to read as follows:

§ 257.2 Definitions.

* * * * *

"Construction/demolition waste" means the waste building materials, packaging, and rubble resulting from construction, remodeling, repair, and demolition operations on pavements, houses, commercial buildings, and other structures. Such wastes include, but are not limited to, bricks, concrete, other masonry materials, soil, rock, lumber, road spoils, rebar, paving materials, and tree stumps.

* * * * *

"Facility" means all contiguous land and structures, other appurtenances, and improvements on the land used for the disposal of solid waste.

"Industrial solid waste" means solid waste generated by manufacturing or industrial processes that is not a hazardous waste regulated under Subtitle C of RCRA. Such waste may include, but is not limited to, waste resulting from the following manufacturing processes: Electric power generation; fertilizer/agricultural chemicals; food and related products/by-products; inorganic chemicals; iron and steel manufacturing; leather and leather products; nonferrous metals manufacturing/foundries; organic chemicals; plastics and resins manufacturing; pulp and paper industry; rubber and miscellaneous plastic products; stone, glass, clay, and concrete products; textile manufacturing; transportation equipment; and water treatment. This term does not include mining waste or oil and gas waste.

"Industrial solid waste disposal facility" means any landfill, surface impoundment, land application unit, or waste pile used for the disposal of industrial solid wastes.

"Land application unit" means an area where wastes are applied onto or incorporated into the soil surface (excluding manure spreading operations) for agricultural pruposes or for treatment and disposal.

"Landfill" means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit, surface impoundment, injection well, or waste pile.

* * * * *

"Municipal solid waste landfill" means any landfill or landfill unit that receives household waste. This landfill also may receive other types of Subtitle D wastes, such as commercial wastes, nonhazardous sewage sludge from publicly owned treatment works, construction/demolition waste, and industrial solid wastes. Such a landfill may be publicly or privately owned.

* * * * *

"Surface impoundment" or "impoundment" means a facility or part of a facility that is a natural topographic depression, human-made excavation, or diked area formed primarily of earthen materials (although it may be lined with human-made materials), that is designed to hold an accumulation of liquid wastes or wastes containing free liquids and that is not an injection well. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

* * * * *

"Waste pile" or "pile" means any noncontainerized accumulation of solid, nonflowing waste that is used for treatment or storage.

* * * * *

4. Section 257.3–4 is amended by revising paragraphs (c)(2)(i) and (c)(2)(ii) to read as follows:

§ 257.3–4 Ground Water.

* * * * *

(c) * * *

(2) * * *

(i) The concentration of that substance in the ground water to exceed the Maximum Contaminant Level promulgated under section 1412 of the Safe Drinking Water Act (codified under 40 CFR Part 141, Subpart B), or

(ii) An increase in the concentration of that substance in the ground water where the existing concentration of that substance exceeds the Maximum Contaminant Level promulgated under section 1412 of the Safe Drinking Water Act (codified under 40 CFR Part 141, Subpart B).

* * * * *

5. Section 257.5 is added to read as follows:

§ 257.5 Notification and exposure information requirements for industrial solid waste disposal facilities and construction/demolition waste landfills.

(a) The owner or operator of a construction/demolition waste landfill or industrial solid waste disposal facility must submit the notification and exposure information, specified on EPA Form No. 9410–1 in Appendix I of this Part, to the appropriate State solid waste management agency and to EPA. The notification form must be signed and certified by the owner or operator or an authorized representative of the owner or operator.

(b) Existing facilities must submit the form within six months of the promulgation date of this rule.

6. In 40 CFR Part 257, Appendix I is revised to read as follows:

BILLING CODE 6560-50-M

APPENDIX I

United States Environmental Protection Agency
Washington, D.C. 20460

EPA

Notification for Industrial Solid Waste Disposal Facilities and Construction/Demolition Waste Landfills

Form Approved

Agency Use Only

ID Number

Date Received

I. Owner and Locational Information

1. Facility Owner

Owner Name *(Corporation, Individual, Public Agency, or Other Agency).*
Street Address or P.O. Box, City, State, and Zip Code

Telephone Number *(Including Area Code and Extension)*

2. Location of Facility

Establishment or Facility Name and Address
(Street Address or Location Description (not P.O. Box) (e.g., 3 miles west of the intersection of Highway 355 and Route 54), City/County, State, and Zip Code)

Telephone Number *(Including Area Code and Extension)*

Latitude		Longitude	
Degrees	Minutes	Degrees	Minutes

3. Name of Contact Person *(Mark the box if contact person is owner)* ☐

Telephone Number *(Including Area Code and Extension)*

4. If this establishment is a facility operated or owned by the Federal Government, enter the GSA Identification Number

II. General Facility Information

1. Which of the Following Unit Types Are at This Facility? *Enter the number of each unit type at this facility. If this facility does not have a unit type, enter "0."*

Type of Unit	Number at Facility
Construction/Demolition Waste Landfill	
Industrial Solid Waste Landfill	
Industrial Solid Waste Surface Impoundment	
Industrial Solid Waste Land Application Unit	
Industrial Solid Waste Pile	

2. Waste Types Disposed of at This Facility *(Check all that apply. Include wastes that currently are accepted or have been accepted in the past)*

☐ Municipal Solid Waste
☐ Asbestos-Containing Waste Material
☐ Infectious Wastes
☐ Small Quantity Generator Waste
☐ Sewage Sludge
☐ Municipal Incinerator Ash
☐ Other Incinerator Ash
☐ Industrial Solid Waste
☐ Construction/Demolition Waste
☐ Other

3. Total Annual Amount Disposed of at This Facility *(Enter the quantity and check the appropriate unit of measurement.)*

☐ Tons ☐ Gallons
☐ Cubic Yards

Quantity

EPA Form 9410-1 (7-88)

V

III. Exposure Information

(You may need to contact a local planning agency, water authority, or health department for information needed to complete question 1.)

1. Number of Households Within One Mile of the Facility *(Mark an "X" in the box if the number is an estimate)* ☐	2. Number of Upgradient and Downgradient Ground-water Monitoring Wells at this Facility *(If none of a type, enter "0" for that type)*	
	Upgradient Wells	Downgradient Wells

IV. State Information

V. Certification

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.

Name and official title of owner, operator or authorized representative	Signature	Date Signed

EPA Form 9410-1 (7-88) MS-B004/2

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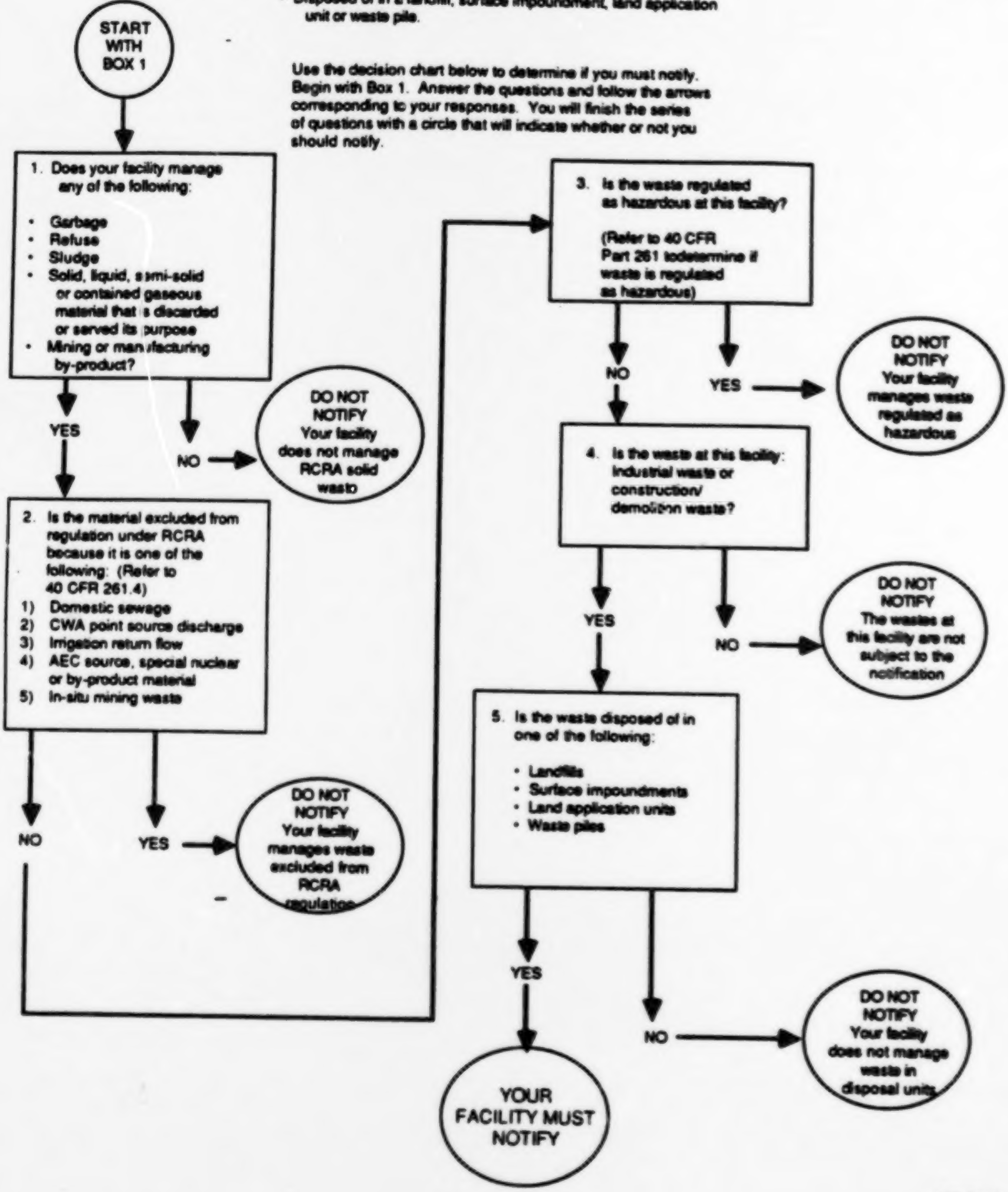
EXHIBIT A

WHO MUST NOTIFY?

You must notify if your facility manages RCRA solid waste that is:

- Not regulated as hazardous under Subtitle C of RCRA, and
- Industrial or construction/demolition waste, and
- Disposed of in a landfill, surface impoundment, land application unit or waste pile.

Use the decision chart below to determine if you must notify. Begin with Box 1. Answer the questions and follow the arrows corresponding to your responses. You will finish the series of questions with a circle that will indicate whether or not you should notify.


START WITH BOX 1
1. Does your facility manage any of the following:
• Garbage
• Refuse
• Sludge
• Solid, liquid, semi-solid or contained gaseous material that is discarded or served its purpose
• Mining or manufacturing by-product?
YES
NO
DO NOT NOTIFY Your facility does not manage RCRA solid waste
2. Is the material excluded from regulation under RCRA because it is one of the following: (Refer to 40 CFR 261.4)
1) Domestic sewage
2) CWA point source discharge
3) Irrigation return flow
4) AEC source, special nuclear or by-product material
5) In-situ mining waste
NO
YES
DO NOT NOTIFY Your facility manages waste excluded from RCRA regulation
3. Is the waste regulated as hazardous at this facility?
(Refer to 40 CFR Part 261 todetermine if waste is regulated as hazardous)
NO
YES
DO NOT NOTIFY Your facility manages waste regulated as hazardous
4. Is the waste at this facility: Industrial waste or construction/demolition waste?
YES
NO
DO NOT NOTIFY The wastes at this facility are not subject to the notification
5. Is the waste disposed of in one of the following:
• Landfills
• Surface impoundments
• Land application units
• Waste piles
YES
NO
DO NOT NOTIFY Your facility does not manage waste in disposal units
YOUR FACILITY MUST NOTIFY

MS-B005

21-999 30 - 2-1019

Notification for Industrial Solid Waste Disposal Facilities and Construction/Demolition Waste Landfills

The U.S. Environmental Protection Agency (EPA) is evaluating solid waste landfills, surface impoundments, land application units, and waste piles in response to the Hazardous and Solid Waste Amendments of 1984 (HSWA). These amendments modified Subtitle D of the Resource Conservation and Recovery Act of 1976 (RCRA), under which EPA sets Federal standards and guidelines for solid waste disposal facilities. Subtitle D facilities manage solid wastes that are not regulated as hazardous wastes under Subtitle C of RCRA. As part of this evaluation, EPA is compiling data on industrial solid waste disposal facilities and construction/demolition waste landfills that manage Subtitle D wastes by requiring those facilities to complete and return the notification form found on pages 3 through 5 of this booklet.

General Information

Authority: Authority for this notification is found in Sections 2002, 3007, and 4010 of the Resource Conservation and Recovery Act, as amended.

Purpose: The primary purpose of this notification is to provide EPA with data on the number and types of industrial solid waste disposal facilities and to evaluate the potential exposure to wastes managed at these facilities.

Who Must Notify: Facilities with existing construction/demolition waste landfills and industrial solid waste landfills, waste piles, surface impoundments, and land application units that manage nonhazardous Subtitle D wastes are required to notify. Do not include units used to manage hazardous wastes regulated under Subtitle C of RCRA. Refer to Exhibit A to help you determine whether you must notify.

Where To Notify: The owner or operator of a construction/demolition waste landfill or an industrial solid waste landfill, surface impoundment, waste pile, or land application unit must send the completed notification form to EPA and the State (address, name, and phone number of State and EPA contracts are attached). Facilities have six months after the effective date of the rule to notify.

When To Notify: Existing facilities have six months after the effective date of the rule to notify.

Penalties: Any owner or operator who knowingly fails to notify or submits false information shall be subject to a civil penalty not to exceed $25,000 for each unit at the facility for which notification is not given or for which false information is submitted.

Additional Information: For additional information, the notifier may contact the RCRA/CERCLA Hotline at (800) 424-9364 or (202) 382-3000.

Definitions

Please read the following before answering the questions.

Commercial solid waste is all types of solid waste generated by stores, offices, restaurants, warehouses, and other nonmanufacturing activities, excluding any residential or industrial wastes.

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Construction/Demolition Waste is waste building materials, packaging, and rubble resulting from the construction, remodelling, repair, and demolition operations on pavements, houses, commercial buildings, and other structures. Such wastes include, but are not limited to, bricks, concrete, other masonry materials, soil, rock, lumber, road spoils, rebar, paving material, and tree stumps.

Disposal is the discharging, depositing, injecting, dumping, spilling, leaking, or placing solid waste into or on any land or water so that such solid waste or any constituent thereof, may enter the environment, be emitted into the air, or discharged into any waters, including ground waters.

Downgradient Well is a well located in the flow path of ground water that has passed under a facility.

Facility means all contiguous land and structures, other appurtenances, and improvements on the land used for the disposal of solid waste. A facility may include more than one unit. Units found at a facility include the following:

- *Land application unit* is an area where wastes are applied onto or into the soil surface (excluding manure-spreading operations) for agricultural purposes or for treatment and disposal. Common names are landspreading, landfarming, or land treatment.
- *Surface impoundment* is a natural or human-made depression in the ground formed mainly of earthen materials and is designed to hold liquid wastes or wastes containing free liquid. Common names are ponds, pits, or lagoons.
- *Waste pile* is a noncontainerized mass of solid, nonflowing waste material that may or may not be enclosure by a fence, a cover, or some other structure. Waste piles can be used for treatment or storage.
- *Landfill* is an area of land or an excavation in which wastes are placed for permanent disposal, and that is not a land application unit, surface impoundment, injection well, or waste pile.

Hazardous Waste is solid waste regulated under 40 CFR Part 261. The regulatory definition of hazardous waste is found at 40 CFR 261.3.

Household Solid Waste is any solid waste including garbage, trash, and sanitary wastes in septic tanks generated by single or multiple residences, hotels, motels, bunkhouses, ranger stations, crew quarters, or any recreational areas such as campgrounds and picnic grounds.

Industrial Solid Waste is solid waste generated by manufacturing or industrial processes that is not a hazardous waste regulated under Subtitle C of RCRA. Such waste may include, but is not limited to, wastes resulting from the following manufacturing processes: electric power generation; fertilizer/agricultural chemicals; food and related products/by-products; inorganic chemicals; iron and steel manufacturing; leather and leather products; nonferrous metals manufacturing/foundries; organic chemicals; plastics and resins manufacturing; pulp and paper industry; rubber and miscellaneous plastic products; stone, glass, clay, and concrete products; textile manufacturing; transportation equipment; and water treatment. This term does not include mining waste or oil and gas waste.

Infectious Waste is any disposable equipment, instruments, utensils, or fomites (substances that may carry pathogenic organisms) from rooms of patients who have been diagnosed or are suspected of having a communicable disease; laboratory wastes such as tissues, blood specimens, excreta, and secretions from patients or laboratory animals;

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disposable fomites; and surgical operating room pathologic specimens, fomites, and other materials from outpatient areas and emergency rooms.

Municipal Incinerator Ash is the residue from burning municipal solid waste. The ash is usually produced in two fractions, fly ash and bottom ash, but typically is disposed of in a combined form.

Municipal Solid Waste is any household, residential, and commercial solid waste.

Residual is any material left over at the end of an industrial process that is not sold as a product. Residuals can include solids, liquids, and sludges.

RCRA is the Resource Conservation and Recovery Act of 1976, the Federal statute that regulates the treatment, storage, and disposal of hazardous and nonhazardous solid waste.

Small Quantity Generator is a generator that generates no more than 100 kg/month of hazardous waste.

Solid Waste is any garbage, refuse, or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows or industrial discharges that are point sources subject to permits under 33 USC 1342 or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

Storage is the temporary holding of waste, after which it is treated, disposed of, or stored elsewhere.

Treatment is any process that changes the chemical, physical, or biological character of a waste.

Upgradient Well is a well located in the flow path of groundwater before it passes under a facility.

Waste is any material that results from a production or treatment process and is not sold as a product. This includes wastes that are managed in waste piles and surface impoundments even if they are eventually recycled.

Wastewater is any water that is used in an industrial process but is not part of the product after the industrial process is complete. Wastewater includes water that has been used to clean equipment or in a boiler blowdown, but wastewater excludes noncontact cooling water. –

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7. A new Part 258 is added as set forth below:

PART 258—CRITERIA FOR MUNICIPAL SOLID WASTE LANDFILLS

Subpart A—General

Sec.
258.1 Purpose, scope, and applicability.
258.2 Definitions.
258.3 Consideration of other Federal laws.
258.4–258.9 [Reserved].

Subpart B—Location Restrictions

258.10 Airport safety.
258.11 Floodplains.
258.12 Wetlands.
258.13 Fault areas.
258.14 Seismic impact zones.
258.15 Unstable areas.
258.16–258.19 [Reserved].

Subpart C—Operating Criteria

258.20 Procedures for excluding the receipt of hazardous waste.
258.21 Cover material requirements.
258.22 Disease vector control.
258.23 Explosive gases control.
258.24 Air criteria.
258.25 Access requirements.
258.26 Run-on/run-off control systems.
258.27 Surface water requirements.
258.28 Liquids restrictions.
258.29 Recordkeeping requirements.
258.30 Closure criteria.
258.31 Post-closure care requirements.
258.32 Financial assurance criteria.
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Appendix I—Volatile Organic Constituents for Ground-Water Monitoring.
Appendix II—Hazardous Constituents.
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Authority: 42 U.S.C. 6907(a)(3), 6944(a) and 6949(c); 33 U.S.C. 1345 (d) and (e).

Subpart A—General

§ 258.1 Purpose, scope, and applicability.

(a) The purpose of this part is to establish minimum national criteria under the Resource Conservation and Recovery Act (RCRA or the Act), as amended, for municipal solid waste landfills and under the Clean Water Act, as amended, for municipal solid waste landfills that are used to dispose of sludge. These minimum national criteria ensure the protection of human health and the environment.

(b) These criteria apply to owners and operators of new and existing municipal solid waste landfills, except as otherwise specifically provided in this part; all other solid waste disposal facilities and practices that are not regulated under Subtitle C of RCRA are subject to the criteria contained in Part 257.

(c) These criteria do not apply to closed units (as defined in this section) of municipal solid waste landfills that close prior to the effective date of this part.

(d) Municipal solid waste landfills failing to satisfy these criteria are considered open dumps for purposes of State solid waste management planning under RCRA.

(e) Municipal solid waste landfills failing to satisfy these criteria constitute open dumps, which are prohibited under section 4005 of RCRA.

(f) Municipal solid waste landfills containing sewage sludge and failing to satisfy these criteria violate sections 309 and 405(e) of the Clean Water Act.

(g) The effective date of this part is [*insert date 18 months after the promulgation date*], unless otherwise specified.

§ 258.2 Definitions.

Unless otherwise noted, all terms contained in this part are defined by their plain meaning. This section contains definitions for terms that appear throughout this part; additional definitions appear in the specific sections to which they apply.

"Active life" means the period of operation beginning with the initial receipt of solid waste and ending at completion of closure activities in accordance with § 258.30 of this part.

"Active portion" means that part of a facility or unit that has received or is receiving wastes and that has not been closed in accordance with § 258.30 of this part.

"Aquifer" means a geological formation, group of formations, or portion of a formation capable of yielding significant quantities of ground water to wells or springs.

"Closed unit" means any solid waste disposal unit that no longer receives solid waste as of the effective date of this part and has received a final layer of cover material.

"Commercial solid waste" means all types of solid waste generated by stores, offices, restaurants, warehouses, and other nonmanufacturing activities, excluding residential and industrial wastes.

"Existing unit" means any solid waste disposal unit that is receiving solid waste as of the effective date of this part and has not received a final layer of cover material.

"Facility" means all contiguous land and structures, other appurtenances, and improvements on the land used for the disposal of solid waste.

"Ground-water" means water below the land surface in a zone of saturation.

"Household waste" means any solid waste (including garbage, trash, and sanitary waste in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreation areas).

"Industrial solid waste" means solid waste generated by manufacturing or industrial processes that is not a hazardous waste regulated under Subtitle C of RCRA. Such waste may include, but is not limited to, waste resulting from the following manufacturing processes: Electric power generation; fertilizer/agricultural chemicals; food and related products/by-products; inorganic chemicals; iron and steel manufacturing; leather and leather products; nonferrous metals manufacturing/foundries; organic chemicals; plastics and resins manufacturing; pulp and paper industry; rubber and miscellaneous plastic products; stone, glass, clay, and concrete products; textile manufacturing; transportation equipment; and water treatment. This term does not include mining waste or oil and gas waste.

"Landfill" means an area of land or an excavation in which wastes are placed for permanent disposal, and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under § 257.2.

"Lateral expansion" means a horizontal expansion of the waste boundaries of an existing landfill unit.

"Leachate" means a liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials removed from such waste.

"Municipal solid waste landfill" means any landfill or landfill unit that receives household waste. This landfill also may receive other types of RCRA Subtitle D wastes, such as commercial waste, nonhazardous sludge, and industrial solid waste. Such a landfill may be publicly or privately owned.

"New unit" means any solid waste disposal unit that has not previously received solid waste prior to the effective date of this part. A new unit also means lateral expansions as defined in this section.

"Open burning" means the combustion of solid waste without:

(1) Control of combustion air to maintain adequate temperature for efficient combustion,

(2) Containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion, and

(3) Control of the emission of the combustion products.

"Operator" means the person responsible for the overall operation of a facility or part of a facility.

"Owner" means the person who owns a facility or part of a facility.

"Run-off" means any rainwater, leachate, or other liquid that drains over land from any part of a facility.

"Run-on" means any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

"Saturated zone" means that part of the earth's crust in which all voids are filled with water.

"Sludge" means any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant.

"Solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources subject to permits under 33 U.S.C. 1342, or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

"Solid waste disposal unit" means a discrete area of land used for the disposal of solid wastes.

"State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianas Islands.

"Waste management unit boundary" means a vertical surface located at the hydraulically downgradient limit of the unit. This vertical surface extends down into the uppermost aquifer.

§ 258.3 Consideration of other Federal laws.

The owner or operator of a municipal solid waste landfill unit must comply with any other applicable Federal rules, laws, regulations, or other requirements.

§§ 258.4–258.9 [Reserved].

Subpart B—Location Restrictions

§ 258.10 Airport safety.

A municipal solid waste landfill unit that may attract birds and is located within 10,000 feet (3,048 meters) of any airport runway used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway used by only piston-type aircraft shall not pose a bird hazard to aircraft.

§ 258.11 Floodplains.

(a) A municipal solid waste landfill unit located in the 100-year floodplain shall not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste so as to pose a hazard to human health and the environment.

(b) For purposes of this section:

(1) "Floodplain" means the lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, that are inundated by the 100-year flood.

(2) "100-year flood" means a flood that has a 1-percent or greater chance of recurring in any given year or a flood of a magnitude equalled or exceeded once in 100 years on the average over a significantly long period.

(3) "Washout" means the carrying away of solid waste by waters of the base flood.

§ 258.12 Wetlands.

(a) New municipal solid waste landfill units shall not be located in wetlands, unless the owner or operator can make the following demonstrations to the State:

(1) There is no practicable alternative that would have less adverse impact on the wetlands and would have no other significant adverse environmental consequences;

(2) The landfill will not:

(i) Cause or contribute to violations of any applicable State water quality standard,

(ii) Violate any applicable toxic effluent standard or prohibition under Section 307 of the Clean Water Act,

(iii) Jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of a critical habitat, protected under the Endangered Species Act of 1973, and

(iv) Violate any requirement under the Marine Protection, Research, and Sanctuaries Act of 1972 for the protection of a marine sanctuary;

(3) The landfill will not cause or contribute to significant degradation of wetlands;

(4) Appropriate and practicable steps have been taken to minimize potential adverse impacts of the landfill on the wetlands; and

(5) Sufficient information is available to make a reasonable determination with respect to these demonstrations.

(b) As used in this section, "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include, but are not limited to, swamps, marshes, bogs, and similar areas.

§ 258.13 Fault areas.

(a) New units of a municipal solid waste landfill shall not be located within 200 feet (60 meters) of a fault that has had displacement in Holocene time.

(b) For the purposes of this section:

(1) "Fault" means a fracture along which strata on one side have been displaced with respect to that on the other side.

(2) "Displacement" means the relative movement of any two sides of a fault measured in any direction.

(3) "Holocene" means the most recent epoch of the Quarternary period, extending from the end of the Pleistocene to the present.

§ 258.14 Seismic impact zones.

(a) At a new municipal solid waste landfill unit located in a "seismic impact zone," all containment structures, including liners, leachate collection systems, and surface water control systems, must be designed to resist the maximum horizontal acceleration in lithified material for the site.

(b) As used in paragraph (a) of this section, "seismic impact zone" means an area with a 10 percent or greater probability that the maximum horizontal acceleration in hard rock, expressed as a percentage of the earth's gravitational pull (g), will exceed 0.10g in 250 years.

(c) As used in paragraph (a) of this section, the "maximum horizontal acceleration in lithified material" means the maximum expected horizontal acceleration depicted on a seismic hazard map, with a 90 percent or greater probability that the acceleration will not be exceeded in 250 years, or the maximum expected horizontal acceleration based on a site-specific seismic risk assessment.

§ 258.15 Unstable areas.

(a) The owner or operator of a municipal solid waste landfill unit located in an unstable area must demonstrate to the State that engineering measures have been incorporated into the unit's design to ensure the stability of the structural components of the unit. The owner or operator must consider the following factors, at a minimum, when determining whether an area is unstable:

(1) On-site or local soil conditions that may result in significant differential settling;

(2) On-site or local geologic or geomorphologic features; and

(3) On-site or local human-made features or events (both surface and subsurface).

(b) As used in this section, "structural components" means liners, leachate collection systems, final covers, run-on/run-off systems, and any other component necessary for protection of human health and the environment.

(c) Existing units of a municipal solid waste landfill located in unstable areas that cannot make the demonstration specified in paragraph (a) of this section must close within 5 years of the effective date of this part in accordance with § 258.30 of this part and conduct post-closure activities in accordance with § 258.31 of this part.

(d) The deadline for a closure required by paragraph (c) of this section may be extended by the State after considering, at a minimum, the following factors:

(1) Availability of alternative disposal capacity; and

(2) Potential risk to human health and the environment.

§§ 258.16–258.19 [Reserved].

Subpart C—Operating Criteria

§ 258.20 Procedures for excluding the receipt of hazardous waste.

(a) The owner or operator of a municipal solid waste landfill unit must implement a program at the facility for detecting and preventing the disposal of regulated hazardous wastes as defined in Part 261 of this title and polychlorinated biphenyls (PCB) wastes as defined in Part 761 of this title. This program must include at a minimum:

(1) Random inspections of incoming loads;

(2) Inspection of suspicious loads;

(3) Records of any inspections;

(4) Training of facility personnel to recognize regulated hazardous waste; and

(5) Procedures for notifying the proper authorities if a regulated hazardous waste is discovered at the facility.

(b) As used in this section, "regulated hazardous waste" means a solid waste that is a hazardous waste, as defined in 40 CFR 261.3, that is not excluded from regulation as a hazardous waste under 40 CFR 261.4(b) or was not generated by a conditionally exempt small quantity generator as defined in § 261.5 of this title.

§ 258.21 Cover material requirements.

(a) The owner or operator of a municipal solid waste landfill unit must cover disposed solid waste with suitable materials at the end of each operating day, or at more frequent intervals if necessary, to control disease vectors, fires, odors, blowing litter, and scavenging.

(b) The State may grant a temporary waiver from the requirement of paragraph (a) of this section if the State determines that there are extreme seasonal climatic conditions that make meeting such requirements impractical.

§ 258.22 Disease vector control.

(a) The owner or operator of a municipal solid waste landfill unit must prevent or control on-site populations of disease vectors using techniques appropriate for the protection of human health and the environment.

(b) For purposes of this section, "disease vectors" means any rodents, flies, mosquitoes, or other animals, including insects, capable of transmitting disease to humans.

§ 258.23 Explosive gases control.

(a) The owner or operator of a municipal solid waste landfill unit shall ensure that:

(1) The concentration of methane gas generated by the facility does not exceed 25 percent of the lower explosive limit for methane in facility structures (excluding gas control or recovery system components); and

(2) The concentration of methane gas does not exceed the lower explosive limit for methane at the facility property boundary.

(b) The owner or operator of a municipal solid waste landfill unit must implement a routine methane monitoring program to ensure that the standards of paragraph (a) of this section are met.

(1) The type and frequency of monitoring must be determined based on the following factors:

(i) Soil conditions;

(ii) The hydrogeologic conditions surrounding the disposal site;

(iii) The hydraulic conditions surrounding the disposal site; and

(iv) The location of facility structures and property boundaries.

(2) The minimum frequency of monitoring shall be quarterly.

(c) If methane gas levels exceeding the limits specified in paragraph (a) of this section are detected, the owner or operator must:

(1) Take all necessary steps to ensure immediate protection of human health;

(2) Immediately notify the State of the methane gas levels detected and the immediate steps taken to protect human health; and

(3) Within 14 days, submit to the State for approval a remediation plan for the methane gas releases. The plan shall describe the nature and extent of the problem and the proposed remedy. The plan shall be implemented upon approval by the State.

(d) As used in this section, "lower explosive limit" means the lowest percent by volume of a mixture of explosive gases in air that will propagate a flame at 25°C and atmospheric pressure.

§ 258.24 Air criteria.

(a) A municipal solid waste landfill shall not violate any applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to section 110 of the Clean Air Act, as amended.

(b) Open burning of solid waste, except for the infrequent burning of agricultural wastes, silvicultural wastes, land-clearing debris, diseased trees, debris from emergency clean-up operations, or ordnance, is prohibited at municipal solid waste landfill units.

§ 258.25 Access requirement.

The owner or operator of a municipal solid waste landfill unit must control public access and prevent unauthorized vehicular traffic and illegal dumping of wastes to protect human health and the environment using artificial barriers, natural barriers, or both, as appropriate.

§ 258.26 Run-on/run-off control systems.

(a) The owner or operator of a municipal solid waste landfill unit must design, construct, and maintain:

(1) A run-on control system to prevent flow onto the active portion of the landfill during the peak discharge form a 25-year storm;

(2) A run-off control system from the active portion of the landfill to collect and control at least the water volume resulting from a 24-hour, 25-year storm.

(b) Run-off from the active portion of the landfill unit must be handled in accordance with § 258.27(a) of this Part.

§ 258.27 Surface water requirements.

A municipal solid waste landfill unit shall not:

(a) Cause a discharge of pollutants into waters of the United States, including wetlands, that violates any requirements of the Clean Water Act, including, but not limited to, the National Pollutant Discharge Elimination System (NPDES) requirements, pursuant to section 402.

(b) Cause the discharge of a nonpoint source of pollution to waters of the United States, including wetlands, that violates any requirement of an area-wide or State-wide water quality management plan that has been approved under section 208 or 319 of the Clean Water Act, as amended.

§ 258.28 Liquids restrictions.

(a) Bulk or noncontainerized liquid waste may not be placed in a municipal solid waste landfill unit unless:

(1) The waste is household waste other than septic waste; or

(2) The waste is leachate or gas condensate derived from the municipal solid waste landfill unit and the landfill unit is equipped with a composite liner and a leachate collection system that is designed and constructed to maintain less than a 30-cm depth of leachate over the liner.

(b) Containers holding liquid waste may not be placed in a municipal solid waste landfill unit unless:

(1) The container is a small container similar in size to that normally found in household waste;

(2) The container is designed to hold liquids for use other than storage, such as a battery or capacitor; or

(3) The waste is household waste.

(c) As used in this section:

(1) "Composite liner" means a system consisting of two components; the upper component must consist of a flexible membrane liner (FML), the lower component must consist of at least a three-foot layer of compacted soil with a hydraulic conductivity of no more than 1×10^{-7} cm/sec. The FML component must be installed in direct and uniform contact with the compacted soil component so as to minimize the migration of leachate through the FML if a break should occur.

(2) "Liquid waste" means any waste material that is determined to contain "free liquids" as defined by Method 9095 (Paint Filter Liquids Test), as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods" (EPA Pub. No. SW–846 [1]).

(3) "Leachate recirculation" means the recycling or reintroduction of leachate into or on a municipal solid waste landfill unit.

(4) "Gas condensate" means the liquid generated as a result of the gas collection and recovery process at the municipal solid waste landfill unit.

§ 258.29 Recordkeeping requirements.

The following information must be recorded, as it becomes available, and retained by the owner or operator of each municipal solid waste landfill unit:

(a) Any monitoring, testing, or analytical data required by Subpart E;

(b) Gas monitoring results from monitoring required by § 258.23 of this part;

(c) Inspection records, training procedures, and notification procedures required in § 258.20 of this part; and

(d) Closure and post-closure care plans as required by § 258.30(b) and § 258.31(c) of this part.

§ 258.30 Closure criteria.

(a) The owner or operator of a municipal solid waste landfill must close each landfill unit in a manner that minimizes the need for further maintenance and minimizes the post-closure formation and release of leachate and explosive gases to air, ground water, or surface water to the extent necessary to protect human health and the environment.

(b) The owner or operator must prepare a written plan that describes the steps necessary to close all units of the muncipal solid waste landfill at any point during its active life in accordance with the closure performance standard in § 258.30(a). The closure plan, at a minimum, must include the following information:

(1) An overall description of the methods, procedures, and processes that will be used to close each unit of a municipal solid waste landfill in accordance with the closure performance standard in § 258.30(a), including procedures for decontaminating the landfill;

(2) An estimate of the maximum extent of operation that will be open at any time during the active life of the landfill;

(3) An estimate of the maximum inventory of wastes ever on-site over the active life of the landfill;

(4) A description of the final cover, designed in accordance with §§ 258.40(b) and 258.40(c), and;

(5) A schedule for completing all activities necessary to satisfy the closure performance standard.

(c) The closure plan must be prepared as of the effective date of this part, or by the initial receipt of solid waste, whichever is later, and must be approved by the State. Any subsequent modification to the closure plan also must be approved by the State. A copy of the most recent approved closure plan must be kept at the facility or at an alternate location designated by the owner or operator until closure of the municipal solid waste landfill has been certified in accordance with § 258.30(e) and the owner or operator has been released from financial assurance requirements for closure under § 258.32(f).

(d) The owner or operator must begin closure activities of each landfill unit, in accordance with the approved closure plan, no later than 30 days following the final receipt of wastes at that landfill unit. Extensions of the deadline for beginning closure may be granted at the discretion of the State if the owner or operator of a municipal solid waste landfill demonstrates that the landfill will not pose a threat to human health and the environment.

(e) Following closure of each municipal solid waste landfill unit, the owner or operator must submit to the State a certification that objectively verifies that closure has been completed in accordance with the approved closure plan, based on a review of the landfill unit by a qualified party.

§ 258.31 Post-closure care requirements.

(a) Following closure of each municipal solid waste landfill unit, the owner or operator must conduct two phases of post-closure care. The first phase must be for a minimum of 30 years and consist of at least the following:

(1) Maintaining the integrity and effectiveness of any final cover, including making repairs to the cover as necessary to correct the effects of settling, subsidence, erosion, or other events, and preventing run-on and run-off from eroding or otherwise damaging the final cover;

(2) Maintaining and operating the leachate collection system in accordance with the requirements in

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[1] Copies may be obtained from: Solid Waste Information, U.S. Environmental Protection Agency, 26 West St. Clair St., Cincinnati, Ohio 45268.

§ 258.40(a)–(b), if applicable, until leachate no longer is generated;

(3) Monitoring the ground-water in accordance with the requirements of § 258.50 and maintaining the ground-water monitoring system; and,

(4) Maintaining and operating the gas monitoring system in accordance with the requirements of § 258.23.

(b) Following the period described in § 258.31(a), the owner or operator must conduct a second phase of post-closure care at each municipal solid waste landfill unit that consists of, at a minimum, ground-water monitoring and gas monitoring. The length of this period is determined by the State and must be sufficient to protect human health and the environment.

(c) The owner or operator of a municipal solid waste landfill must prepare a written post-closure plan that describes monitoring and routine maintenance activities that will be carried out during each phase of the post-closure care period in accordance with the requirements of § 258.31(a) and (b). The post-closure plan must include, at a minimum, the following information:

(1) A description of the monitoring and maintenance activities required in § 258.31 (a) and (b) for each unit, and the frequency at which these activities will be performed;

(2) Name, address, and telephone number of the person or office to contact about the facility during both phases of the post-closure period; and

(3) A description of the planned uses of the property during both phases of the post-closure care period. Post-closure use of the property must never be allowed to disturb the integrity of the final cover, liner(s), or any other components of the containment system, or the function of the monitoring systems, unless, upon the demonstration by the owner or operator, the State determines that the activities will not increase the potential threat to human health or the environment or the disturbance is necessary to reduce a threat to human health or the environment. The owner or operator must obtain approval from the State in order to remove any wastes or waste residues, the liner, or contaminated soils from the land.

(d) The post-closure plan must be prepared as of the effective date of the rule, or by the initial receipt of solid waste, whichever is later, and must be approved by the State. Any subsequent modification to the post-closure plan must also be approved by the State. A copy of the most recent approved post-closure plan must be kept at the facility or at an alternate location designated by the owner or operator until completion of the post-closure care period has been certified in accordance with § 258.31(f) and the owner or operator has been released from financial assurance for post-closure care under § 258.32(g).

(e) Following closure of the entire municipal solid waste landfill, the owner or operator must record a notation on the deed to the landfill property, or some other instrument that is normally examined during title search. The owner or operator may request permission from the State to remove the notation from the deed if all wastes are removed from the facility in accordance with paragraph (c)(3) of this section. The notation on the deed must in perpetuity notify any potential purchaser of the property that:

(1) The land has been used as a municipal solid waste landfill; and

(2) Its use is restricted under paragraph (c)(3) of this section.

(f) Following completion of the two-phase post-closure care period for each unit, the owner or operator of an MSWLF must submit to the State a certification that objectively verifies that both phases of post-closure care have been completed in accordance with the approved post-closure plan, based on a review of the landfill unit by a qualified party.

§ 258.32 Financial assurance criteria.

(a) The requirements of this section apply to the owner and operator of each municpal solid waste landfill, except an owner or operator who is a State or Federal government entity whose debts and liabilities are the debts and liabilities of a State or the United States.

(b) The owner or operator must have a detailed written estimate, in current dollars, of the cost of hiring a third party to close the municipal solid waste landfill in accordance with the closure plan developed to satisfy the closure requirements in § 258.30 of this part.

(1) The estimate must equal the cost of closing the landfill at the point in the municipal solid waste landfill's active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan (see § 258.30(b) of this part).

(2) During the active life of the municipal solid waste landfill, the owner or operator must annually adjust the closure cost estimate for inflation.

(3) The owner or operator must increase the closure cost estimate and the amount of financial assurance provided under paragraph (f) of this section if changes to the closure plan or landfill conditions increase the maximum cost of closure at any time over the active life of the municipal solid waste landfill.

(4) The owner or operator may request a reduction in the closure cost estimate and the amount of financial assurance provided under paragraph (f) of this section if he can demonstrate that the cost estimate exceeds the maximum cost of closure at any time over the life of the landfill.

(5) The owner or operator must keep a copy of the latest closure cost estimate at the landfill until the owner or operator has been notified by the State that he has been released from closure financial assurance requirements under paragraph (f) of this section.

(c) The owner or operator must have a detailed written estimate, in current dollars, of the cost of hiring a third party to conduct each phase of post-closure monitoring and maintenance of the municipal solid waste landfill in accordance with the post-closure plan developed to satisfy the post-closure requirements in § 258.31 (a) and (b) of this part. The post-closure cost estimate for each phase of post-closure care used to demonstrate financial assurance in paragraph (g) of this section is calculated by multiplying the annual cost estimate for each phase of post-closure care by the number of years of post-closure care required in that phase.

(1) The cost estimate for each phase of post-closure care must be based on the most expensive costs of post-closure care during that phase.

(2) During the active life of the municipal solid waste landfill, the owner or operator must annually adjust the post-closure cost estimate for inflation.

(3) The owner or operator must increase the amount of the post-closure care cost estimate and the amount of financial assurance provided under paragraph (g) of this section if changes in the post-closure plan or landfill conditions increase the maximum costs of post-closure care.

(4) The owner or operator may request a reduction in the post-closure cost estimate and the amount of financial assurance provided under paragraph (g) of this section if he can demonstrate that the cost estimate exceeds the maximum costs of post-closure care remaining over the post-closure care period.

(5) The owner or operator must keep a copy of the latest post-closure care cost estimate at the landfill until he has been notified by the State that he has been released from post-closure financial assurance requirements for the entire landfill under paragraph (g) of this section.

(d) An owner or operator of a municipal solid waste landfill required to undertake a corrective action program under § 258.58 of this part must have a detailed written estimate, in current dollars, of the cost of hiring a third party to perform the corrective action in accordance with the program required under § 258.58 of this part. The corrective action cost estimate is calculated by multiplying the annual costs of corrective action by the number of years of the corrective action program.

(1) The owner or operator must annually adjust the estimate for inflation until the corrective action program is completed.

(2) The owner or operator must increase the amount of the corrective action cost estimate and the amount of financial assurance provided under paragraph (h) of this section if the annual corrective action costs, in current dollars, for the remaining period over which corrective action will be conducted exceed the cost estimate.

(3) The owner or operator may request a reduction in the amount of the corrective action cost estimate and the amount of financial assurance provided under paragraph (h) of this section if he demonstrates that the cost estimate exceeds the maximum remaining costs of corrective action.

(4) The owner or operator must keep a copy of the latest estimate of the costs of performing corrective action at the landfill until he has been notified by the State that he has been released from corrective action financial assurance requirements under paragraph (h) of this section.

(e) The mechanisms used to demonstrate financial assurance under this section must ensure that the funds necessary to meet the costs of closure, post-closure care, and corrective action for known releases will be available in a timely manner whenever they are needed. Financial assurance requirements must satisfy the following criteria:

(1) The financial assurance mechanisms must ensure that the amount of funds ensured is sufficient to cover the costs of closure, post-closure care, and corrective action for known releases when needed;

(2) The financial assurance mechanisms must ensure that funds will be available in a timely fashion when needed;

(3) The financial assurance mechanisms must guarantee the availability of the required amount of coverage from the effective date of these requirements or prior to the initial receipt of solid waste, whichever is later, until the owner or operator establishes an alternative financial assurance mechanism or is released from the financial assurance requirements under paragraphs (f), (g), and (h) of this section;

(4) The financial assurance mechanisms that may be used to satisfy the requirements in paragraphs (f), (g), and (h) of this section must provide flexibility to the owner or operator; and

(5) The financial assurance mechanisms must be legally valid and binding and enforceable under State and Federal law.

(f) The owner or operator of each municipal solid waste landfill must establish, in a manner in accordance with paragraph (e) of this section, financial assurance for closure of the landfill, in an amount equal to the most recent closure cost estimate prepared in accordance with paragraph (b) of this section. The owner or operator must provide continuous coverage for closure until released from financial assurance requirements in accordance with this paragraph. The owner or operator may be released from financial assurance requirements for closure after the State has received certification that closure has been completed in accordance with the approved closure plan, as required under § 258.30(e) of this part. Following receipt of the closure certification, the State will:

(1) Notify the owner or operator in writing that he/she is no longer required to maintain financial assurance for closure, or;

(2) Provide the owner or operator with a detailed written statement of any reason to believe that closure has not been conducted in accordance with the approved closure plan.

(g) The owner or operator of each municipal solid waste landfill must establish, in a manner in accordance with paragraph (e) of this section, financial assurance for the costs of each phase of post-closure care as required under § 258.31 (a) and (b) of this part, in an amount equal to the sum of the most recent cost estimates for each phase of post-closure care, prepared in accordance with paragraph (c) of this section. The owner or operator must provide continuous coverage for post-closure care until released from financial assurance requirements for post-closure care under paragraph § 258.31(g) of this section. The owner or operator may be released from financial assurance requirements for post-closure care requirements after the State has received a certification that the two-phase post-closure care period has been completed in in accordance with the approved plan, as required under § 258.31(f) of this part. Following receipt of the post-closure care certification, the State will:

(1) Notify the owner or operator in writing that he is no longer required to maintain financial assurance for post-closure care, or;

(2) Provide the owner or operator with a detailed written statement of any reason to believe that post-closure care has not been conducted in accordance with the approved post-closure plan.

(h) The owner or operator of each municipal solid waste landfill required to undertake a corrective action program under § 258.58 of this part must establish, in a manner in accordance with paragraph (e) of this section, financial assurance for the most recent corrective action program, in an amount equal to the corrective action cost estimate prepared in accordance with paragraph (d) of this section. The owner or operator must provide continuous coverage for corrective action until released from financial assurance requirements for corrective action in accordance with this paragraph. The owner or operator may be released from financial assurance requirements for corrective action after the State has received certification that the corrective action remedy has been completed in accordance with the approved corrective plan, as required by § 258.58(e) of this part. Following receipt of the corrective action certification, the State will:

(1) Notify the owner or operator in writing that he is no longer required to maintain financial assurance for corrective action, or;

(2) Provide the owner or operator with a detailed written statement of any reason to believe that corrective action has not been completed in accordance with the approved corrective action plan.

§§ 258.33–258.39 [Reserved].

Subpart D—Design Criteria

§ 258.40 Design Criteria.

(a) New municipal solid waste landfill units must be designed with liners, leachate collection systems, and final cover systems, as necessary, to ensure that the design goal established under paragraph (b) of this section is met in the aquifer at the waste management unit boundary, or an alternative boundary, as specified by the State under paragraph (d) of this section.

(b) The State must establish a design goal for new MSWLF units. This design shall, at a minimum, achieve a ground-water carcinogenic risk level with an excess lifetime cancer risk level (due to continuous lifetime exposure) within the 1×10^{-4} to 1×10^{-7} range.

[**Note** to § 258.40(b): EPA is considering alternatives to the 1×10^{-4} to 1×10^{-4} risk range. The Agency specifically requests comment on a fixed risk level of 1×10^{-5} or an upper bound risk level of 1×10^{-4} (with the States having discretion to be more stringent) as alternatives to the proposed risk range. A fixed risk level of 1×10^{-5} would provide a uniform level of protection across all States. On the other hand, setting an upper bound risk level of 1×10^{-4} would allow States greater flexibility in establishing more stringent risk levels based on site specific conditions].

(c) When establishing the design necessary to comply with paragraph (a) of this section, the State shall consider at least the following factors:

(1) The hydrogeologic characteristics of the facility and surrounding land;

(2) The climatic factors of the area;

(3) The volume and physical characteristics of the leachate;

(4) Promixity of gound-water users; and

(5) Quality of ground water.

(d) A State may establish an alternative boundary to be used in lieu of the waste management unit boundary. The alternative boundary shall not exceed 150 meters from the waste management unit boundary and shall be located on land owned by the owner or operator of the MSWLF. The establishment of the alternative boundary shall be based on analysis and consideration of at least the following factors:

(1) The hydrogeologic characteristics of the facility and surrounding land;

(2) The volume and physical and chemical characteristics of the leachate;

(3) The quantity, quality, and direction of flow of ground water;

(4) The proximity and withdrawal rate of the ground-water users;

(5) The availability of alternative drinking water supplies;

(6) The existing quality of the ground water, including other sources of contamination and their cumulative impacts on the ground water;

(7) Public health, safety, and welfare effects; and

(8) Practicable capability of the owner or operator.

(e) Existing municipal solid waste landfill units must be equipped at closure with a final cover system that is designed to prevent infiltration of liquid through the cover and into the waste.

§§ 258.41–258.49 [Reserved]

Subpart E—Ground-Water Monitoring and Corrective Action

§ 258.50 Applicability.

(a) The requirements in this Part apply to municipal solid waste landfill units, except as provided in paragraph (b) of this section.

(b) Ground-water monitoring requirements under § 258.51 through § 258.55 of this Part will be suspended for an MSWLF unit if the owner or operator can demonstrate to the State that there is no potential for migration of hazardous constituents from that unit to the uppermost aquifer during the active life, including the closure period, of the unit and during post-closure care. This demonstration must be certified by a qualified geologist or geotechnical engineer, and must incorporate reliable site-specific data. If detailed hydrogeologic data are unavailable, the owner or operator must provide an adequate margin of safety in the prediction of potential migration of hazardous constituents by basing such predictions on assumptions that maximize the rate of hazardous consitutent migration.

(c) Within 6 months of the effective date of the rule, the State must specify a schedule for the owners or operators of MSWLF units to comply with the ground-water monitoring requirements specified in §§ 258.51–258.55. This schedule must be specified to ensure that 25 percent of MSWLF units are in compliance within 2 years of the effective date of this rule; 50 percent (50%) of landfill units are in compliance within 3 years of the effective date of this rule; 75 percent of the landfill units are in compliance within 4 years of the effective date of this rule; and all landfill units are in compliance within 5 years of the effective date of this rule. In setting the compliance schedule, the State must consider potential risks posed by the MSWLF unit to human health and the environment. The following factors should be considered in determining potential risk:

(1) Proximity of human and environmental receptors;

(2) Design of the landfill unit;

(3) Age of the landfill unit; and

(4) Resource value of the underlying aquifer, including:

(i) Current and future uses;

(ii) Proximity and withdrawal rate of users; and

(iii) Ground-water quality and quantity.

(d) If the State does not set a schedule for compliance as specified in paragraph (c) of this Section, the following compliance schedule shall apply:

(1) Existing landfill units less than 1 mile from a drinking water intake (surface or subsurface) must be in compliance with the ground-water monitoring requirements specified in §§ 258.51–258.55 within 3 years of the effective date of this rule;

(2) Existing landfill units greater than 1 mile but less than 2 miles from a drinking water intake (surface or subsurface) must be in compliance with the ground-water monitoring requirements specified in §§ 258.51–258.55 within 4 years of the effective date of this rule;

(3) Existing landfill units greater than 2 miles from a drinking water intake (surface or subsurface) must be in compliance with the ground-water monitoring requirements specified in §§ 258.51–258.55 within 5 years of the effective date of this rule; and

(4) A new landfill unit must be in compliance with the ground-water monitoring requirements specified in §§ 258.51–258.55 before waste can be placed in the unit.

(e) Once established at a unit, ground-water monitoring shall be conducted throughout the active life and post-closure care of that municipal solid waste landfill unit as specified in § 258.31.

§ 258.51 Ground-water monitoring systems.

(a) A ground-water monitoring well system approved by the State must be installed at the closest pacticable distance from the waste management unit boundary or the alternative boundary specified by the State under § 258.40. Where subsurface conditions cause hazardous constituents to migrate horizontally past the boundary specified under this paragraph before descending to the uppermost aquifer, the State can designate another appropriate downgradient location for the ground-water monitoring wells.

(b) A ground-water monitoring system must consist of a sufficient number of wells, installed at appropriate locations and depths, to yield ground-water samples from the uppermost aquifer that:

(1) Represent the quality of background ground water that has not been affected by leakage from a landfill unit; and

(2) Represent the quality of ground water passing the locations specified under paragraph (a) of this section.

(c) If approved by the State, separate ground-water monitoring systems are not required for each landfill unit when the facility has several landfill units, provided the multi-unit ground-water monitoring system will be as protective of human health and the environment as individual monitoring systems for each unit.

(d) Monitoring wells must be cased in a manner that maintains the integrity of the monitoring well bore hole. This casing must be screened or perforated and packed with gravel or sand, where necessary, to enable collection of ground-water samples. The annular space (i.e., the space between the bore hole and well casing) above the sampling depth must be sealed to prevent contamination of samples and the ground water.

(1) The design, installation, development, and decommission of any monitoring wells, piezometers and other measurement, sampling, and analytical devices must be documented in the operating record; and

(2) The monitoring wells, piezometers, and other measurement, sampling, and analytical devices must be operated and maintained so that they perform to design specifications throughout the life of the monitoring program.

(e) The number, spacing, and depths of monitoring systems shall be proposed by the owner or operator and approved by the State based upon site-specific technical information that must be developed by the owner or operator and must include thorough characterization of:

(1) Aquifer thickness, flow rate, and flow direction; and

(2) Saturated and unsaturated geologic units and fill materials overlying the uppermost aquifer, including, but not limited to: thicknesses, stratigraphy, lithology, hydraulic conductivities, and porosities.

§ 258.52 Determination of ground-water trigger level.

(a) The State must establish, before a Phase I monitoring program is initiated, ground-water trigger levels that are protective of human health and the environment for all Appendix II constituents.

(b) The levels are to be specified by the State as:

(1) Maximum Contaminant Level (MCL) promulgated under § 1412 of the Safe Drinking Water Act (codified) under 40 CFR Part 141, Subpart B; or

(2) For constituents for which MCLs have not been promulgated, an appropriate health-based level established by the State that satisfies the following criteria:

(i) The level is derived in a manner consistent with Agency guidelines for assessing the health risks of environmental pollutants (51 FR 33992, 34006, 34014, 34028);

(ii) Is based on scientifically valid studies conducted in accordance with the Toxic Substances Control Act Good Laboratory Practice Standards (40 CFR Part 792) or equivalent;

(iii) For carcinogens, the level represents a concentration associated with an excess lifetime cancer risk level (due to continuous lifetime exposure) within the 1×10^{-4} to 1×10^{-7} range; and

(iv) For systemic toxicants, the level represents a concentration to which the human population (including sensitive subgroups) could be exposed to on a daily basis that is likely to be without appreciable risk of deleterious effects during a lifetime.

[**Note** to § 258.52(b)(2)(iii): EPA is considering alternatives to the 1×10^{-4} to 1×10^{-7} risk range. The Agency specifically requests comment on a fixed risk level of 1×10^{-6} or an upper bound risk level of 1×10^{-4} (with the States having discretion to be more stringent) as alternatives to the proposed risk range. A fixed risk level of 1×10^{-6} would provide a uniform level of protection across all States. On the other hand, setting an upper bound risk level of 1×10^{-4} would allow States greater flexibility in establishing more stringent risk levels based on site specific conditions].

(3) For constituents for which no health-based level is available that meets the criteria in § 258.52(a)(1) or (2) the State may establish a trigger level that shall be:

(i) An indicator for protection of human health and the environment, using the exposure assumptions specified under § 258.52(a)(2), or

(ii) The background concentration.

(4) For constituents for which the background level is higher than health-based levels established under § 258.52(b)(1)–(3), the trigger level shall be the background concentration.

§ 258.53 Ground-water sampling and analysis requirements.

(a) The ground-water monitoring program must include consistent sampling and analysis procedures that are designed to ensure monitoring results that provide an accurate representation of ground-water quality at the background and downgradient wells installed in compliance with § 258.51(b) of this part. At a minimum, the program must be documented in the operating record and must include procedures and techniques for:

(1) Sample collection;

(2) Sample preservation and shipment;

(3) Analytical procedures;

(4) Chain of custody control; and

(5) Quality assurance and quality control.

(b) The ground-water monitoring program must include sampling and analytical methods that are appropriate for ground-water sampling and that accurately measure hazardous constituents and other monitoring parameters in ground-water samples.

(c) The sampling procedures and frequency must be protective of human health and the environment. The sampling requirement must ensure that the statistical procedure used to evaluate samples has an acceptably low probability of failing to identify contamination.

(d) Ground-water elevations must be measured in each well immediately prior to sampling.The owner or operator must determine the rate and direction of ground-water flow in the uppermost aquifer each time ground-water gradient changes as indicated by previous sampling period elevation mesurements.

(e) The owner or operator must establish background ground-water quality on a hydraulically upgradient well(s) for each of the monitoring parameters or constituents required in the particular ground/water monitoring program that applies to the municipal solid waste landfill unit, as determined under § 258.54(a), or § 258.55(a) of this part. The minimum number of samples used to establish background ground-water quality must be consistent with the appropriate statistical procedures determined pursuant to paragraph (h) of this section.

(f) Background ground-water quality at existing units may be based on sampling of wells that are not upgradient from the waste management area where:

(1) Hydrogeologic conditions do not allow the owner or operator to determine what wells are upgradient; and

(2) Sampling at other wells will provide an indication of background ground-water quality that is as representative or more representative than that provided by upgradient wells.

(g) The State may determine alternate background ground-water quality on a site-specific basis if true background ground-water quality cannot be detected on site. The alternate background ground-water quality should be based on monitoring data from the uppermost aquifer that is available to the State.

(h) Statistical procedures are as follows:

(1) Ground-water monitoring data for each phase of the monitoring programs of §§ 258.54, 258.55 and any other applicable section of this rule will be collected from background wells (except as allowed in § 258.53(g)), and at monitoring wells as specified pursuant to § 258.53(a). Based on the site-specific conditions identified in § 258.54(c), the owner or operator must select the appropriate statistical procedure to determine if a statistically significant increase over background value for each parameter or constituent has occurred.

(2) The owner or operator must employ one of the following statistical

procedures, in combination with the designated sampling requirement, to determine a statistically significant increase:

(i) A parametric analysis of variance (ANOVA) followed by multiple comparisons procedures to identify statistically significant evidence of contamination. The procedure must include estimation and testing of the contrasts between each downgradient well's mean and the background mean level for each constituent;

(ii) An analysis of variance based on ranks followed by multiple comparisons procedures to identify statistically significant evidence of contamination. The procedure must include estimation and testing of the contrasts between each downgradient well's mean and the background mean level for each constituent;

(iii) Tolerance or prediction interval procedure in which a tolerance interval for each constituent is established from the distribution of the background data, and the level of each constituent in each downgradient well is compared to the upper tolerance or prediction limit;

(iv) A control chart approach that gives control limits for each constituent; and

(v) Another statistical test procedure that is protective of human health and the environment and meets the ground-water protection standard of § 258.52(b).

(3) The State may establish an alternative sampling procedure and statistical test for any of the constituents listed in Appendix II or parameters listed in § 258.54(b), as required to protect human health and the environment. Factors to consider for establishing this alternative statistical procedure include:

(i) If the distributions for different constituents differ, more than one procedure may be needed. The owner or operator must show that the normal distribution is not appropriate if using a nonparametric or other methodology not requiring an assumption of normality. For any statistic not based on a normal distribution, a goodness of fit test shall be conducted to demonstrate that the normal distribution is not appropriate. Other tests shall be conducted to demonstrate that the assumptions of the statistic or distribution are not grossly isolated;

(ii) Each parameter or constituent is to be tested for separately. Each time that a test is done, the test for individual constituents shall be done at a type I error level or less than 0.01. A multiple comparison procedure may be used at a type I experiment-wide error rate no less than 0.05. The owner or operator must evaluate the ability of the method to detect contamination that is actually present and may be required to increase the sample size to achieve an acceptable error level.

(iii) The monitoring well system should be consistent with § 258.51. The owner or operator must ensure that the number, location, and depth of monitoring wells will detect hazardous constituents that migrate from the municipal solid waste landfill unit;

(iv) The statistical procedure should be appropriate for the behavior of the parameters or constituents involved. It should include methods for handling data below the limit of detection. The owner or operator should evaluate different ways of dealing with values below the limit of detection and choose the one that is most protective of human health and the environment. In cases where there is a high proportion of values below limits of detection, the owner or operator may demonstrate that an alternative procedure is more appropriate; and

(v) The statistical procedure used should account for seasonal and spatial variability and temporal correlation.

(4) If contamination is detected by any of the statistical tests, and the State or the owner or operator suspects that detection is an artifact caused by some feature of the data other than contamination, the State may specify that statistical tests of trend, seasonal variation, autocorrelation, or other interfering aspects of the data be done to establish whether the significant result is indicative of detection of contamination or resulted from natural variation.

(i) The owner or operator must determine whether or not there is a statistically significant increase (or decrease, in the case of Phase I) over background values for each parameter or constituent required in the particular ground-water monitoring program that applies to the landfill unit, as determined under §§ 258.54(a) or 258.55(a) of this part. The owner or operator must make these statistical determinations each time he assesses ground-water quality at the boundary designated under § 258.40 of this part.

(A) In determining whether a statistically significant increase or decrease has occurred, the owner or operator must compare the ground-water quality of each parameter or constituent at each monitoring well designated pursuant to § 258.51 to the background value of that parameter or constituent, according to the statistical procedures specified under paragraph (h) of this section.

(B) Within a reasonable time period after completing sampling (as determined by the State), the owner or operator must determine whether there has been a statistically significant increase or decrease over background at each monitoring well.

§ 258.54 Phase I monitoring program.

(a) Phase I monitoring is required at municipal solid waste landfill units except as otherwise provided in §§ 258.55 and 258.58 of this Part.

(b) At a minimum, a Phase I monitoring program must include the following monitoring parameters or constituents:

(1) Ammonia (as N)
(2) Bicarbonate (HCO_3)
(3) Calcium
(4) Chloride
(5) Iron
(6) Magnesium
(7) Manganese, dissolved
(8) Nitrate (as N)
(9) Potassium
(10) Sodium
(11) Sulfate (SO_4)
(12) Chemical Oxygen Demand (COD)
(13) Total Dissolved Solids (TDS)
(14) Total Organic Carbon (TOC)
(15) pH
(16) Arsenic
(17) Barium
(18) Cadmium
(19) Chromin
(20) Cyanide
(21) Lead
(22) Mercury
(23) Selenium
(24) Silver
(25) The volatile organic compounds (VOCs) listed in Appendix I of this part.

(c) The State must determine an appropriate monitoring frequency on a site-specific basis by considering aquifer flow rate and resource value of the ground water. The minimum monitoring frequency for all parameters specified in paragraph (b) of this section is semiannual except during the post-closure care when minimum monitoring frequency shall be determined by the State on a site-specific basis.

(d) If the owner or operator determines, pursuant to § 258.53(h) of this part, that there is a statistically significant increase or decrease over background for two or more of parameters (1) to (15) specified in paragraph (b) of this section, at any monitoring well at the boundary specified under § 258.51(a), or a statistically significant increase over background for any one or more of parameters (16) to (24) specified in paragraph (b) of this section or the VOCs listed in Appendix I, at any monitoring well at the boundary specified under § 258.51(a), (s)he:

(1) Must notify the State within 14 days of this finding. The notification must indicate what Phase I parameters have shown statistically significant changes from background levels;

(2) Must establish a Phase II monitoring program meeting the requirements of § 258.55 this part within a reasonable time period as determined by the State; and

(3) May demonstrate that a source other than a municipal solid waste landfill unit cause the contamination or that the contamination resulted from error in sampling, analysis, or evaluation. While the owner or operator may make a demonstration under this paragraph in lieu of establishing a Phase II monitoring program, the owner or operator is not relieved of the requirement to establish a Phase II monitoring program within a reasonable time period unless the demonstration made under this paragraph successfully shows that a source other than the municipal solid waste landfill unit caused the change or that the change resulted from an error in sampling, analysis, or evaluation. In making a demonstration under this paragraph, the owner or operator must:

(i) Notify the State in writing within 7 days of determining statistically significant evidence of contamination that (s)he intends to make a demonstration under this paragraph;

(ii) Within 90 days, or an alternative time period approved by the State, submit to the State a report that demonstrates that a source other then a municipal solid waste landfill unit caused the contamination or that the contamination resulted from error in sampling, analysis, or evaluation; and

(iii) Continue to monitor in accordance with the Phase I monitoring program.

§ 258.55 Phase II monitoring program.

(a) Phase II monitoring is required whenever statistically significant increases or decreases over background have been detected for two or more of parameters (1) to (15) specified under § 258.54(b); or whenever statistically significant increases over background have been detected for one or more of parameters (16) to (24) specified under § 258.54(b), or the VOCs listed in Appendix I; or the State determines, pursuant to § 258.58, that a corrective action remedy has been completed.

(b) At a minimum, Phase II monitoring program must include the constituents in Appendix II of this part.

(c) Within 90 days of triggering a Phase II monitoring program or an alternative time period approved by the State, the owner or operator must sample the ground water in all monitoring wells identified pursuant to § 258.51 of this part and analyze those samples for all constituents identified in Appendix II of this part.

(d) If Appendix II constituents are not detected in response to paragraph (c), the State shall specify an appropriate frequency for repeated sampling and analysis for Appedix II constituents during the active life, closure, and post-closure care of the unit. The following factors should be considered by the State when setting an appropriate frequency for a full Appendix II analysis:

(1) Lithology of the aquifer and unsaturated zone;

(2) Hydraulic conductivity of the aquifer and unsaturated zone;

(3) Aquifer flow velocities;

(4) Minimum distance between upgradient edge of unit and downgradient monitoring well screen (minimum distance of travel); and

(5) Nature of any constituents detected in response to this section.

(e) If, after conducting Phase II monitoring or an appropriate time period approved by the State, the owner or operator determines that there has not been a statistically significant increase over background of parameters or constituent specified pursuant to § 258.55(b) of this part at any monitoring well at the boundary specified under § 258.51(a), that unit may return to Phase I monitoring. The following factors should be considered by the State when determining an appropriate time period for sampling before allowing a unit to return to Phase I monitoring:

(1) Lithology of the aquifer and unsaturated zone;

(2) Hydraulic conductivity of the aquifer and unsaturated zone;

(3) Aquifer flow velocities; and

(4) Maximum distance between upgradient edge of unit and down-gradient monitoring well screen (potential maximum distance of travel).

(f) If any Appendix II constituents are detected at statistically significant levels above background response to (c) or (d) of this section, the owner or operator must:

(1) Notify the State in writing within 14 days, or an alternative time period approved by the State, which Appendix II constituents have been detected at statistically significant levels above background; and

(2) Within 90 days, and on a quarterly basis thereafter during the active life and closure of the unit, resample all wells and conduct analyses for those constituents in Appendix II of this part that are determined to be present at levels above background concentrations at the boundary specified under § 258.51(a) of this part.

(3) The State shall determine an appropriate minimum monitoring frequency for these Appendix II constituents during the post-closure period. The following factors should be considered by the State when setting a minimum monitoring frequency:

(i) Lithology of the aquifer and unsaturated zone;

(ii) Hydraulic conductivity of aquifer and unsaturated zone;

(iii) Aquifer flow velocities;

(iv) Minimum distance between upgradient edge of unit and downgradient monitoring well screen (minimum distance of travel); and

(v) Nature of the constituents detected in response to this section.

(g) If any Appendix II parameters or constituents are identified under paragraph (d) of this section that had not been identified previously under (c) or (f)(2) of this section, the owner or operator must, within 14 days, submit to the State a report on the concentration of any Appendix II constituents detected at statistically significant levels above background concentrations.

(h) If any Appendix II constituent is detected at statistically significant levels above the ground-water trigger level established under § 258.52 of this section, the owner or operator:

(1) Must notify the State of this finding in writing within 14 days. The notification must indicate what Phase II parameters or constituents have exceeded the ground-water trigger level;

(2) Must meet the requirements of § 258.56 of this part within a time period determined by the State; and

(3) Must continue to monitor in accordance with the Phase II monitoring program established under this section; or

(4) May demonstrate that a source other than a municipal solid waste landfill unit caused the contamination, or that the increase resulted from error in sampling, analysis, or evaluation. While the owner or operator may make a demonstration under this paragraph in lieu of establishing a corrective action program, (s)he is not relieved of the requirement to establish a corrective action program within a reasonable time period unless the demonstration made under this paragraph successfully shows that a source other than the municipal solid waste landfill unit caused the increase, or that the increase resulted from an error in sampling, analysis, or evaluation. In making a demonstration

under this paragraph, the owner or operator must:

(i) Notify the State in writing within 7 days of determining statistically significant evidence of contamination that (s)he intends to make a demonstration under this paragraph;

(ii) Within 90 days, or an alternate time period approved by the State, submit to the State a report that demonstrates that a source other than a municipal solid waste landfill unit caused the contamination or that the increase resulted from error in sampling, analysis, or evaluation; and

(iii) Continue to monitor in accordance with the Phase II monitoring program.

§ 258.56 Assessment of corrective measures.

(a) An assessment must be conducted by the owner or operator when any of the constituents listed in Appendix II has been detected at a statistically significant level exceeding the ground-water trigger levels defined under § 258.52 of this part during the Phase II monitoring program.

(b) The owner or operator must continue to monitor in accordance with the Phase II monitoring program. The State may require the owner or operator to conduct additional monitoring in order to characterize the nature and extent of the plume.

(c) The State shall specify the scope of the assessment, which may include the following:

(1) Assessment of the effectiveness of potential corrective measures in meeting all of the requirements and objectives of the remedy as described under § 258.57;

(2) Evaluation of performance, reliability, ease of implementation, and potential impacts of appropriate potential remedies, including safety impacts, cross-media impacts, and control of exposure to any residual contamination;

(3) Assessment of the time required to begin and complete the remedy;

(4) Estimation of the costs of remedy implementation;

(5) Assessment of institutional requirements such as State or local permit requirements or other environmental or public health requirements that may substantially affect implementation of the remedy(s); and

(6) Evaluation of public acceptability.

(d) The State may require the owner or operator to evaluate as part of the corrective measure study one or more specific potential remedies. These remedies may include a specific technology or combination of technologies, that, in the State's judgment, achieve the standards for remedies specified in § 258.57.

(e) The owner or operator shall submit a report to the State on the remedies evaluated pursuant to paragraphs (a)–(d). The State shall then select a remedy based on the criteria described in § 258.57.

(f) If at any time during the assessment described under paragraphs (a)–(e) of this section the State determines that the facility poses a threat to human health or the environment, the State may require the owner or operator to implement measures defined under § 258.58(a)(3) and/or (a)(4) to protect human health and the environment.

§ 258.57 Selection of remedy and establishment of ground-water protection standard.

(a) Based on the results of the corrective measure study conducted under § 258.56, the State must select a remedy that, at a minimum, meets the standards listed in paragraph (b) below.

(b) Remedies must:

(1) Be protective of human health and the environment;

(2) Attain the ground-water protection standard as specified pursuant to paragraphs (e) and (f) of this section;

(3) Control the source(s) of releases so as to reduce or eliminate, to the maximum extent practicable, further releases of Appendix II constituents into the environment that may pose a threat to human health or the environment; and

(4) Comply with standards for management of wastes as specified in § 258.58(d).

(c) In selecting a remedy that meets the standards of § 258.57(b), the State, as appropriate, shall consider the following evaluation factors:

(1) Any potential remedy(s) shall be assessed for the long- and short-term effectiveness and protectiveness it affords, along with the degree of certainty that the remedy will provide successful. Factors to be considered include:

(i) Magnitude of reduction of existing risks;

(ii) Magnitude of residual risks in terms of likelihood of further releases due to waste remaining following implementation of a remedy;

(iii) The type and degree of long-term management required, including monitoring, operation, and maintenance;

(iv) Short-term risks that might be posed to the community, workers, or the environment during implementation of such a remedy, including potential threats to human health and the environment associated with excavation, transportation, and redisposal or containment;

(v) Time until full protection is achieved;

(vi) Potential for exposure of humans and environmental receptors to remaining wastes, considering the potential threat to human health and the environment associated with excavation, transportation, redisposal, or containment;

(vii) Long-term reliability of the engineering and institutional controls; and

(viii) Potential need for replacement of the remedy.

(2) Effectiveness of the remedy in controlling the source to reduce further releases. The following factors should be considered:

(i) The extent to which containment practices will reduce further releases;

(ii) The extent to which treatment technologies may be used.

(3) The ease or difficulty of implementing a potential remedy(s) shall be assessed by considering the following types of factors:

(i) Degree of difficulty associated with constructing the technology;

(ii) Expected operational reliability of the technologies;

(iii) Need to coordinate with and obtain necessary approvals and permits from other agencies;

(iv) Availability of necessary equipment and specialists; and

(v) Available capacity and location of needed treatment, storage, and disposal services.

(4) Practicable capability of the owner or operator including a consideration of the technical and economic capability.

(5) The degree to which community concerns are addressed by a potential remedy(s) shall be assessed.

(d) The State shall specify as part of the selected remedy a schedule(s) for initiating and completing remedial activities. The State will consider the following factors in determining the schedule of remedial activities;

(1) Extent and nature of contamination;

(2) Practical capabilities of remedial technologies in achieving compliance with ground-water protection standards established under § 258.57(e) and other objectives of the remedy;

(3) Availability of treatment or disposal capacity for wastes managed during implementation of the remedy;

(4) Desirability of utilizing technologies that are not currently available, but which may offer significant advantages over already available technologies in terms of

effectiveness, reliability, safety, or ability to achieve remedial objectives;

(5) Potential risks to human health and the environment from exposure to contamination prior to completion of the remedy; and

(6) Resource value of the aquifer including:

(i) Current and future uses;

(ii) Proximity and withdrawal rate of users;

(iii) Ground-water quantity and quality;

(iv) The potential damage to wildlife, crops, vegetation, and physical structures caused by exposure to waste constituent;

(v) The hydrogeologic characteristic of the facility and surrounding land;

(vi) Ground-water removal and treatment costs; and

(vii) The cost and availability of alternative water supplies.

(7) Practicable capability of the owner or operator.

(8) Other relevant factors.

(e) The State shall specify concentration levels for each Appendix II constituent detected in the ground water above trigger levels that the remedy must achieve. Such ground-water protection standards (GWPSs) will be established by the State as follows:

(1) The standard(s) shall be concentration levels in the ground water that protect human health and the environment;

(2) Unless another level is deemed necessary to protect environmental receptors, standards shall be established as follows:

(i) For known or suspected carcinogens, standards shall be established at concentration levels that represent an excess upper bound lifetime risk to an individual of between 1×10^{-4} and 1×10^{-7}, and

(ii) For systemic toxicants, standards shall represent concentration levels to which the human population (including sensitive subgroups) could be exposed on a daily basis without appreciable risk of deleterious effect during a lifetime.

[**Note to § 258.57(e)(2)(i):** EPA is considering alternatives to the 1×10^{-4} to 1×10^{-7} risk range. The Agency specifically requests comment on a fixed risk level of 1×10^{-6} or an upper bound risk level of 1×10^{-4} (with the States having discretion to be more stringent) as alternatives to the proposed risk range. A fixed risk level of 1×10^{-6} would provide a uniform level of protection across all States. On the other hand, setting an upper bound risk level of 1×10^{-4} would allow States greater flexibility in establishing more stringent risk levels based on site specific conditions.]

(3) In establishing ground-water protection standards that meet the requirements of § 258.57(e) (i) and (ii), above, the State may consider the following:

(i) Multiple contaminants in the ground water;

(ii) Exposure threats to sensitive environmental receptors;

(iii) Other site-specific exposure or potential exposure to ground water; and

(iv) The reliability, effectiveness, practicability, or other relevant factors of the remedy.

(4) For ground water that is a current or potential source of drinking water, the State shall consider maximum contaminant levels promulgated under the Safe Drinking Water Act in establishing ground-water protection standards; and

(5) If the owner or operator can demonstrate to the State that an Appendix II constituent already is present in the ground water at a background level, then the GWPS will not be set below background levels unless the State determines that:

(i) Cleanup to levels below background levels is necessary to protect human health and the environment; and

(ii) Such cleanup is in connection with an area-wide remedial action under other authorities.

(f) The State may determine that remediation of a release of an Appendix II constituent from a municipal solid waste landfill is not necessary if the owner or operator demonstrates to the State's satisfaction that:

(1) The ground water also is contaminated by substances that have originated from a source other than a municipal solid waste landfill unit and those substances are present in concentrations such that cleanup of the release from the municipal solid waste landfill unit would provide no significant reduction in risk to actual or potential receptors; or

(2) The constituent(s) is present in ground water that:

(i) Is not a current or potential source of drinking water; and

(ii) Is not hydraulically connected with waters to which the hazardous constituents are migrating or are likely to migrate in a concentration(s) that represents a statistically significant increase over background concentrations; or

(3) Remediation of the release(s) is technically impracticable or results in unacceptable cross-media impacts.

(g) A determination by the State pursuant to subparagraph (2) above shall not affect the authority of the State to require the owner or operator to undertake source control measures or other measures that may be necessary to eliminate or minimize further releases to the ground water, to prevent exposure to the ground water, or to remediate the ground water to concentrations that are technically practicable and significantly reduce threats to human health or the environment.

(h) The State shall specify in the remedy requirements for achieving compliance with the ground-water protection standards established under § 258.57(e) as follows:

(1) The ground-water protection standard shall be achieved at all points within the plume of contamination that lie beyond the ground-water monitoring well system established under § 258.51(a).

(2) The State shall specify in the remedy the length of time during which the owner or operator must, in order to achieve compliance with a ground-water protection standard, demonstrate that concentrations of Appendix II constituents have not exceeded the standard(s). Factors that may be considered by the State in determining these timing requirements include:

(i) Extent and concentration of the release(s);

(ii) Behavior characteristics of the hazardous constituents in the ground water;

(iii) Accuracy of monitoring or modeling techniques, including any seasonal, meteorological, or other environmental variabilities that may affect the accuracy; and

(iv) Characteristics of the ground water.

§ 258.58 Implementation of the corrective action program.

(a) If any constituent is detected at statistically significant levels above the ground-water protection standard established under § 258.57(e), the owner or operator must:

(1) Establish and implement a corrective action ground-water monitoring program that must:

(i) At a minimum, meet the requirements of a Phase II monitoring program under § 258.54;

(ii) Demonstrate the effectiveness of the corrective action remedy; and

(iii) Demonstrate compliance with ground-water protection standard pursuant to § 258.57(f).

(2) Implement the corrective action remedy selected under § 258.57;

(3) Notify all persons who own the land or reside on the land that directly overlies any part of the plume of contamination; and

(4) Take any interim measures deemed necessary by the State to ensure the protection of human health

and the environment. Interim measures should, to the extent practicable, be consistent with the objectives of and contribute to the performance of any remedy that may be required pursuant to § 258.57. The following factors may be considered by the State in determining whether interim measures are necessary:

(i) Time required to develop and implement a final remedy;

(ii) Actual or potential exposure of nearby populations or environmental receptors to hazardous constituents;

(iii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;

(iv) Further degradation of the ground water that may occur if remedial action is not initiated expeditiously;

(v) Weather conditions that may cause hazardous constituents to migrate or be released;

(vi) Risks of fire or explosion, or potential for exposure to hazardous constituents as a result of an accident or failure of a container or handling system; and

(vii) Other situations that may pose threats to human health and the environment.

(b) The State may determine, based on information developed by the owner or operator after implementation of the remedy has begun or other information, that compliance with a requirement(s) for the remedy selected under § 258.57 is not technically practicable. In making such determinations, the State shall consider:

(1) The owner or operator's efforts to achieve compliance with the requirement(s); and

(2) Whether other currently available or new and innovative methods or techniques could practicably achieve compliance with the requirements.

(c) If the State determines that compliance with a remedy requirement is not technically practicable, the State may require that the owner or operator:

(1) Implement alternate measures to control exposure of humans or the environment to residual contamination, as necessary to protect human health and the environment; and

(2) Implement alternate measures for control of the sources of contamination, or for removal or decontamination of equipment, units, devices, or structures required to implement the remedy that are:

(i) Technically practicable; and

(ii) Consistent with the overall objective of the remedy.

(d) All solid wastes that are managed pursuant to a remedy required under § 258.57, or an interim measure required under § 258.58(a)(4), shall be managed in a manner:

(1) That is protective of human health and the environment; and

(2) That complies with applicable RCRA requirements.

(e) Remedies selected pursuant to § 258.57 shall be considered complete when the State determines that:

(1) Compliance with the ground-water protection standards established under § 258.57(e) have been achieved, according to the requirements of § 258.57(f); and

(2) All actions required to complete the remedy have been satisfied.

(f) Upon completion of the remedy, the owner or operator shall submit to the State a certification that the remedy has been completed in accordance with the requirements of § 258.58(e). The certification must be signed by the owner or operator and by an independent professional(s) skilled in the appropriate technical discipline(s).

(g) When, upon receipt of the certification, and in consideration of any other relevant information, the State determines that the corrective action remedy has been completed in accordance with the requirements under paragraph (e) of this section, the State shall release the permittee from the requirements for financial assurance for corrective action under § 258.32.

§ 258.59 [Reserved].

Appendix I—Volatile Organic Constituents for Ground-Water Monitoring

Acetone
Acrolein
Acrylonitrile
Benzene
Bromochloromethane
Bromodichloromethane
cis-1,3-Dichloropropene
Trans-1,3-Dichloropropene
1,4-Difluorobenzene
Ethanol
Ethylbenzene
Ethyl methacrylate
4-Bromofluorobenzene
Bromoform
Bromomethane
2-Butanone (Methyl ethyl ketone)
Carbon disulfide
Carbon tetrachloride
Chlorobenzene
Chlorodibromomethane
Chloroethane
2-Chloroethyl vinyl ether
Chloroform
Chloromethane
Dibromomethane
1,4-Dichloro-2-butane
Dichlorodifluoromethane
1,1-Dichloroethane
1,2-Dichloroethane
2-Hexanone
Iodomethane
Methylene chloride
4-Methyl-2-pentanone
1,1-Dichloroethene
trans-1,2-Dichloroethene
Styrene
1,1,2,2-Tetrachloroethane
Toluene
1,1,1-Trichloroethane
1,1,2-Trichloroethane
Trichloroethene
Trichlorofluoromethane
1,2,3-Trichloropropane
Vinyl acetate
Vinyl chloride
Xylene

Appendix II—Hazardous Constituents

Systematic name	CAS RN	Common name
Acenaphthylene	208-96-8	Acenaphthalene.
Acenaphthylene, 1,2-dihydro-	83-32-9	Acenaphthene.
Acetamide, N-(4-ethoxphenyl)-H	62-44-2	Phenacetin.
Acetamide, N-9H-fluoren-2-yl	53-96-3	2-Acetylaminofluorene.
Acetic acid ethenyl ester	108-05-4	Vinyl acetate.
Acetic acid (2,4-5-trichloro-phenoxy)-	93-76-5	2,4,5-T.
Acetic acid (2,4-dichloro-phenoxy)-	94-75-7	2,4-Dichlorophenoxy-acetic acid.
Acetronitrile	75-05-8	Acetonitrile.
Aluminum	7429-90-5	Aluminum (total).
Anthracene	120-12-7	Anthracene.
Antimony	7440-36-0	Antimony (total).
Aroclor 1016	12674-11-2	Aroclor 1016.
Aroclor 1221	11104-28-2	Aroclor 1221.
Aroclor 1232	11141-16-5	Aroclor 1232.
Aroclor 1242	53469-21-9	Aroclor 1242.
Aroclor 1248	12672-29-6	Aroclor 1248.
Aroclor 1254	11097-69-1	Aroclor 1254.

Systematic name	CAS RN	Common name
Aroclor 1260	11096-82-5	Aroclor 1260.
Arsenic	7440-38-2	Arsenic (total).
Barium	7440-39-3	Barium total).
Benz[a]anthracene, 7,12,-dimethyl-	57-97-6	7,12-Dimethylbenz[a] anthracene.
Benz[j]aceanthrylene, 1,2-dihydo-3-methyl	56-49-5	3-Methylcholanthrene.
Benz[e]acephenanthrylene	205-99-2	Benzo[b]fluoranthene.
Benzamide, 3,5-dichloror-N-(1,1-dimethyl-2-propynl)-	23950-58-5	Benzo[b]fluoranthene.
Benzamide, 3,5-dichloro-N-(1,1-dimethyl-2-propynyl)-	23950-58-5	Pronamide.
Benz[a]anthracene	56-55-3	Benx[a]anthracene.
Benzenamine	62-53-3	Aniline.
Benzenamine, 2-methyl-5-nitro	99-55-8	5-Nitro-o-toluidine.
Benzenamine, 2-nitro	88-74-4	2-Nitroaniline.
Benzenamine, 3-nitro	99-09-2	3-Nitroaniline.
Benzenamine, 4-chloro	106-47-8	p-Chloroaniline.
Benzenamine, 4-nitro-	100-01-6	p-nitroaniline.
Benzenamine, 4,4′-methylenebis [2-chloro	101-14-4	4,4′-Methylenebis (2-chloroaniline).
Benzenamine, N-nitroso-N-phenyl	86-30-6	N-Nitrosodiphenylmamine.
Benzenamine, N-phenyl-	122-39-4	Diphenylamine.
Benzenamine, N,N-dimethy-4-(phenylazo)-	60-11-7	p-Dimethylamino-azobenzene.
Benzene	71-43-2	Benzene.
Benzene, 1-bromo-4-phenoxy-	101-55-3	4-Bromophenyl phenyl ether.
Benzene, 1-chloro-4-phenoxy-	7005-72-3	4-Chlorophenyl phenyl ether.
Benzene, 1-methyl-2,4-dinitro	121-14-2	2.4-Dinitrotoluene.
Benzene, 1,1′-(2,2,2,-trichloro-ethylidene)bis[4-chloro-	50-29-3	DDT.
Benzene, 1,1′-(2,2,2-trichloro-ethylidene)bis[4-methoxy	72-43-5	Methoxychlor.
Benzene 1,1′-(2,2-dichloro-ethylidene)bis[4-chloro-	72-54-8	DDD.
Benzene 1,1′-(2,2-dichloro-ethenylidene)bis[4-chloro	72-55-9	DDE.
Benzene 1,2-dichloro-	95-50-1	o-Dichlorobenzene.
Benzene 1,2,4-trichloro	120-82-1	1,2,4-trichlorobenzene.
Benzene 1,2,4,5-tetrachloro	95-94-3	1,2,4,5-Tetrachloro-benzene.
Benzene 1,3-Dichloro-	541-73-1	M-Dichlorobenzene.
Benzene 1,4-dichloro-	106-46-7	p-Dichlorobenzene.
Benzene 1,4-dinitro-	100-25-4	meta-Dinitrobenzene.
Benzene, 2-methyl-1,3-dinitro-	606-20-2	2,6-Dinitrotoluene.
Benzene, chloro	108-90-7	Chlorobenzene.
Benzene, dimethyl-	1330-20-7	Xylene (total).
Benzene, ethenyl-	100-42-5	Styrene.
Benzene, ethyl-	100-41-4	Ethyl benzene.
Benzene, hexachloro-	118-74-1	Hexachlorobenzene.
Benzene, methyl	106-88-3	Toluene.
Benzene, nitro-	96-95-3	Nitrobenzene.
Benzene, pentachloro-	608-93-5	Pentachlorobenzene.
Benzene, pentachloronitro-	82-68-8	Pentachloronitrobenzene.
Benzeneacetic acid, 4-chloro-a-(4-chlorophenyl)-a-hydroxy-, ethyl ester	510-15-6	Chlorobenzilate.
1,2-Benzenedicarboxylic acid, bis(2-ethylhexyl)ester	117-81-7	Bis(2-ethylhexyl) phthalate.
1,2-Benzenedicarboxylic acid, butyl phenylmethyl ester	85-68-7	Butyl benzyl phthalate.
1,2-Benzenedicarboxylic acid, dibutyl ester	84-74-2	Di-n-butyl phthalate.
1,2-Benzenedicarboxylic acid, diethyl ester	84-66-2	Diethyl phthalate.
1,2-Benzenedicarboxylic acid, dimethyl ester	131-11-3	Dimethyl phthalate.
1,2-Benzenedicarboxylic acid, dioctyl ester	117-84-0	Di-n-octyl phthalate.
1,3-Benzenediol	106-46-3	Resorcinol.
Benzeneethanamine, a, a-dimethyl-	122-09-8	alpha, alpha-Dimethyl-phenethylamine.
Benzenemethanol	100-51-6	Benzyl alcohol.
Benzenethiol	106-98-5	Benzenethiol.
1,3-Benodioxole, 5-(1-propenyl)-	120-58-1	Isosafrole.
1,3-Benzodioxole, 5-(2-propenyl)-	94-59-7	Safrole.
Benzo[k]fluoranthene	207-08-9	Benzo[k]fluoranthene.
Benzoic acid	65-85-0	Benzoic acid.
Benzo[rst]pentaphene	189-55-9	Dibenzo[a,i]pyrene.
Benzo[ghi]perylene	191-24-2	Benzo(ghi)perylene.
Benzo[a]pyrene	50-32-8	Benzo[a]pyrene.
Beryllium	7440-41-7	Beryllium (total).
1,1′-Biphen[yi]-4,4′-diamine, 3,3′-dichloro-	91-94-1	3,3′-Dichlorobenzidine.
1,1′-Biphen[yi]-4,4′-diamine, 3,3′-dimethoxy-	119-90-4	3,3′-Dimethoxybenzidine.
1,1′-Biphen[yi]-4,4′-diamine, 3,3′-dimethyl-	119-93-7	3,3′-Dimethylbenzidine.
1,1′-Biphenyl[-4-amine	92-67-1	4-Aminobiphenyl.
1,1′-Biphenyl[-4-4-amine	92-87-5	Benzidine.
1,3-Butadiene, 1,1,2,3,4,4-hexachloro-	87-68-3	Hexachorobutadiene.
1,3-Butadiene, 2-chloro-	126-99-8	2-Chloro-1,3-butadine.
1-Butanamine, N-butyl-N-nitroso-	924-16-3	N-Nitrosodi-n-butylamine.
2-Butanone	78-93-3	Methyl ethyl ketone.
2-Butene, 1,4-dichloro-, (E)-	110-57-6	trans-1,4-Dichloro-2-butene.
Cadmium	7440-43-9	Cadmium (total).
Calcium	7440-70-2	Calcium (total).
Carbon disulfide	75-15-0	Carbon disulfide.
Chromium	7440-47-3	Chromium (total).
Chrysene	218-01-9	Chrysene.
Cobalt	7440-48-4	Cobalt (total).
Copper	7440-50-8	Copper (total).
Cyanide	57-12-5	Cyanide.
2,5-Cyclohexadiene-1,4 dione	106-51-4	p-Benzoquinone.
Cyclohexane, 1,2,3,4,5,6-hexachloro-(1a,2a,3B,4a,5B,6B)-	319-84-6	alpha-BHC.

Systematic name	CAS RN	Common name
Cyclohexane, 1,2,3,4,5,6-hexachloro-, (1a,2B,3a,4B,5a,6B)-	319–85–7	beta-BHC.
Cyclohexane, 1,2,3,4,5,6-hexachloro-, (1a,2a,3a,4B,5a,6B)-	319–86–8	delta-BHC.
Cyclohexane, 1,2,3,4,5,6-hexachloro-(1a,2a,3B,4a,5a,6B)-	58–89–9	gamma-BHC.
2-Cyclohexen-1-one, 3,5,5-trimethyl	78–59–1	Isophorone.
1,3-Cyclopentadiene, 1,2,3,4,5,5-hexachloro-	77–47–4	Hexachlorocyclopent-adiene.
Dibenz[a,h]anthracene	53–70–3	Dibenz[a,h]anthracene.
Dibenzo[b,e][1,4]dioxin, 2,3,7,8-tetrachloro-	1746–01–6	2,3,7,8-Tetrachlorodi benzo-p-dioxin; Hexachlorodibenzo-p-dioxin; Pentachlorodi-benzo-p-dioxins; Tetra-chlorodibenzo-p-dioxins.
Dibenzo[b,def]chrysene	189–64–0	Dibenzo[a,h]pyrene.
Dibenzofuran	132–64–9	Dibenzofuran, Hexa-chloro-dibenzofurans; Penta-chlorodibenzo-furans; Tetrachlorodi-benzofurans.
2,7:3,6-Dimethanonaphth [2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-la,2,2a,3,6,6a,7,7a-octahydro, 1aa,2B,2aa,3B,6B,6aa,7B,7aa)-.	60–57–1	Dieldrin.
2,7:3,6-Dimethanonaphth [2,3-b]oxirene, 3,4,5,6,9,9-hexachloro-1a,2,2a,3,6,6a,7,7a-octahydro, 1aa,2B,2aB,3a,6a,6aB,7B,7aa)-.	72–20–8	Endrin.
1,4:5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexachloro-1,4,4a,5,8,8a-hexahydro-, 1aa,4a,4aB,5a,8a,8aB)-.	309–00–2	Aldrin.
1,4:5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexachloro-1,4,4a,5,8,8a-hexahydro-, 1aa,4a,4aB,5B,8B,8aB)-.	465–73–6	Isodrin.
1,4-Dioxane	123–91–1	1,4-Dioxane.
Ethanamine, N-ethyl-N-nitroso	55–18–5	N-Nitrosodiethylamine.
Ethanamine, N-methyl-N-nitroso-	10595–95–6	N-Nitrosomethylethylamine.
Ethane, 1,1-dichloro-	75–34–3	1,1-Dichloroethane.
Ethane, 1,1′-[methylenebis (oxy)]bis[2-chloro-	111–91–1	Bis(2-chloroethoxy) methane.
Ethane, 1,1′-oxybis[2-chloro-	111–44–4	Bis(2-chloroethyl) ether.
Ethane, 1,1′-trichloro-	71–55–6	1,1,1-Trichloroethane.
Ethane, 1,1,1,2-tetrachloro-	630–20–6	1,1,1,2-Tetrachloroethane.
Ethane, 1,1,2-trichloro-	79–00–5	1,1,2-Trichloroethane.
Ethane, 1,1,2,2-tetrachloro-	79–34–5	1,1,2,2-Tetrachloroethane.
Ethane, 1,2-dibromo-	106–93–4	1,2-Dibromoethane.
Ethane, 1,2-dichloro-	107–06–2	1,2-Dichloroethane.
Ethane, chloro-	75–00–3	Chloroethane.
Ethane, hexachloro-	67–72–1	Hexachloroethane.
Ethane, pentachloro-	76–01–7	Pentachloroethane.
1,2-Ethanediamine, N,N-dimethyl-N′-′2-pyridinyl-N′-(2-thienylmethyl)-	91–80–5	Methapyrilene.
Ethanone, 1-phenyl-	98–86–2	Acetophenone.
Ethene, (2-chloroethoxy)-	110–75–8	2-Chloroethyl vinyl ether.
Ethene, 1,1-dichloro-	75–35–4	1,1-Dichloroethylene.
Ethene, 1,2-dichloro- (E)-	156–60–5	trans-1,2-Dichloro ethene.
Ethene, chloro-	75–01–4	Vinyl chloride.
Ethene, tetrachloro-	127–18–4	Tetrachloroethene.
Ethene, trichloro-	79–01–6	Trichloroethene.
Fluoranthene	206–44–0	Fluoranthene.
Fluoride	12984–48–8	Fluoride.
9H-Fluorene	86–73–7	Fluorene.
2-Hexanone	591–78–6	2-Hexanone.
Hydrazine, 1,2-diphenyl-	122–66–7	1,2-Diphenylhydrazine.
Indeno[1,2,3-cd]pyrene	193–39–5	Indeno(1,2,3-cd)pyrene.
Iron	7439–89–6	Iron (total).
Lead	7439–92–1	Lead (total).
Magnesium	7439–94–4	Magnesium (total).
Manganese	7439–96–5	Manganese (total).
Mercury	7439–97–6	Mercury (total).
Methanamine, N-methyl-N-nitroso	62–75–9	N-Nitrosodimethylamine.
Methane, bromo-	74–83–9	Bromomethane.
Methane, bromodichloro-	75–27–4	Bromodichloromethane.
Methane, chloro-	74–87–3	Chloromethane.
Methane, dibromo-	74–95–3	Dibromomethane.
Methane, dibromochloro-	124–48–1	Chlorodibromomethane.
Methane, dichloro-	74–09–2	Dichloromethane.
Methane, dichlorodifluoro-	75–71–8	Dichlorodifluoromethane.
Methane, iodo-	74–88–4	Iodomethane.
Methane, tetrachloro-	56–23–5	Carbon tetrachloride.
Methane, tribromo-	75–25–2	Tribromomethane.
Methane, trichloro-	67–66–3	Chloroform.
Methane, trichlorofluoro-	75–69–4	Trichloromonofluoromethane.
Methanesulfonic acid, methyl ester	66–27–3	Methyl methanesulfonate.
Methanethiol, trichloro-	75–70–7	Trichloromethanethiol.
4,7-Methano-1H-indene-1,2,4,5,6,7,8,8-octachloro-2,3,3a,4,7,7a-hexahydro.	57–74–9	Chlordane.
4,7-Methano-1H-indene-1,4,5,6,7,8,8-heptachloro-3a,4,7,7a-tetrahydro-	76–44–8	Heptachlor.
2,5-Methano-2H-indeno[1,2-b] oxirene, 2,3,4,5,6,7,7-heptachloro-1a,1b,5,5a,6,6a-hexahydro-, (1aa,1bB,2a,5a,5aB,6B,6aa).	1024–57–3	Heptachlor epoxide.
6,9-Methano-2,4,3-benzo-dioxathiepin, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-, 3-oxide, (3a,5aB,6a,9a,9aB).	959–98–8	Endosulfan I.
6,9-Methano-2,4,3-benzo-dioxathiepin, 6,7,8,9,10,10-hexachloro,1,5,5a,6,9,9a-hexahydro-, 3-oxide, (3a,5aa,6B,9B,9aa).	33213–65–9	Endosulfan II.
1,3,4-Methano-2H-cyclobutal [cd]pentalen-2-one, 1,1a,3,3a,4,5,5,5a,5b,6-decachloro-octahydro-.	143–50–0	Kepone.
1,2,4-Methanocyclopenta[cd] pentalene-5-carboxaldehyde, 2,2a,3,3,4,7-hexachloro-decahydro-, (1a,2B,2aB,4B,4aB,5B,6aB,6aB,7R*).	7421–93–4	Endrin aldehyde.
Morpholine, 4-nitroso-	59–89–2	N-Nitrosomorpholine.

Systematic name	CAS RN	Common name
1-Naphthalenamine	134-32-7	1-Naphthylamine.
2-Naphthalenamine	91-59-8	2-Naphthylamine.
Naphthalene	91-20-3	Naphthalene.
Naphthalene, 2-chloro-	91-58-7	2-Chloronaphthalene.
Naphthalene, 2-methyl-	91-57-6	2-Methylnaphthalene.
1,4-Naphthalenedione	130-15-4	1,4-Naphthoquinone.
Naphtho[1,2,3,4-def]chrysene	192-65-4	Dibenzo[a,e]pyrene.
Nickel	7440-02-0	Nickel (total).
Osmium	7440-04-2	Osmium (total).
Oxirane	75-21-8	Ethylene oxide.
2-Pentanone, 4-methyl-	108-10-1	4-Methyl-2-pentanone.
Phenanthrene	85-01-8	Phenanthrene.
Phenol	108-95-2	Phenol.
Phenol, 2-(1-methylpropyl)-4,6-dinitro	88-85-7	2-sec-Butyl-4,6-dinitro-phenol.
Phenol, 2-chloro-	95-57-8	2-Chlorophenol.
Phenol, 2-methyl-	95-48-7	ortho-Cresol.
Phenol, 2-methyl-4,6-dinitro-	534-52-1	4,6-Dinitro-o-cresol.
Phenol, 2-nitro-	88-75-5	2-Nitrophenol.
Phenol, 2,2′-methylenebis [3,4,6-trichloro-	70-30-4	Hexachlorophene.
Phenol, 2,3,4,6-tetrachloro-	58-90-2	2,3,4,6-Tetrachlorophenol.
Phenol, 2,4-dichloro-	120-83-2	2,4-Dichlorophenol.
Phenol, 2,4-dimethyl-	105-67-9	2,4-Dimethylphenol.
Phenol, 2,4-dinitro-	51-28-5	2,4-Dinitrophenol.
Phenol, 2,4,5-trichloro-	95-95-4	2,4,5-Trichlorophenol.
Phenol, 2,4,6-trichloro-	88-06-2	2,4,6-Trichlorophenol.
Phenol, 2,6-dichloro-	87-65-0	2,6-Dichlorophenol.
Phenol, 4-chloro-3-methyl-	59-50-7	p-Chloro-m-cresol.
Phenol, 4-methyl-	106-44-5	para-Cresol.
Phenol, 4-nitro-	100-02-7	4-Nitrophenol.
Phenol, pentachloro-	87-86-5	Pentachlorophenol.
Phosphorodithioic acid, 0,0-diethyl S-[(ethylthio) methyl] ester	298-02-2	Phorate.
Phosphorodithioic acid, 0,0-diethyl S-[2-(ethylthio) ethyl] ester	298-04-4	Disulfoton.
Phosphorothioic acid, 0-[4-[(dimethylamino) sulfonyl)] phenyl] 0,0-dimethyl ester.	52-85-7	Famphur.
Phosphorothioic acid, 0,0-diethyl 0-(4-nitrophenyl) ester	56-38-2	Parathion.
Phosphorothioic acid, 0,0-diethyl 0-pyrazinyl ester	297-97-2	0,0-Diethyl 0,2-pyrazinyl phosphorothioate.
Phosphorothioic acid, 0,0-dimethyl 0-(4-nitrophenyl) ester	298-00-0	Methyl parathion.
Piperidine, 1-nitroso-	100-75-4	N-Nitrosopiperidine.
Potassium	7440-09-7	Potassium (total).
1-Propanamine, N-nitroso-N-propyl-	621-64-7	Di-n-propylnitrosamine.
Propane, 1,2-dibromo-3-chloro	96-12-8	1,2-Dibromo-3-chloro-propane.
Propane, 1,2,-dichloro-	78-87-5	1,2-Dichloropropane.
Propane, 12,3-trichloro-	96-18-4	1,2,3-Trichloropropane.
Propane, 2,2′-oxybis[1-chloro-	108-60-1	Bis(2-chloroisopropyl) ether.
Propanedinitrile	109-77-3	Malononitrile.
Propanenitrile	107-12-0	Ethyl cyanide.
Propanenitrile, 3-chloro-	542-76-7	3-Chloropropionitrile.
Propanoic acid, 2-(2,4,5-trichlorophenoxyl)-	93-72-1	Silvex.
1-Propanol, 2,3-dibromo-phosphate (3:1)	126-72-7	Tris(2,3-dibromopropyl) phosphate.
1-Propanol, 2-methyl-	78-83-1	Isobutyl alcohol.
2-Propanone	67-64-1	Acetone.
2-Propenal	107-02-8	Acrolein.
1-Propene, 1,1,2,3,3,3-hexachloro-	1888-71-7	Hexachloropropene.
1-Propene, 1,3-dichloro-, (E)-	10061-02-6	trans-1,3-Dichloropropene.
1-Propene, 1,3-dichloro-, (Z)-	10061-01-5	cis-1,3-Dichloropropene.
1-Propene, 1,3-chloro-	107-05-1	3-Chloropropene.
2-Propenenitrile, 2-methyl-.	126-98-7	Methacrylonitrile.
2-Propenenitrile	107-13-1	Acrylonitrile.
2-Propenoic acid, 2-methyl-, ethyl ester	97-63-2	Ethyl methacrylate.
2-Propenoic acid, 2-methyl-, methyl ester	80-62-6	Methyl methacrylate.
2-Propen-1-ol	107-18-6	Allyl alcohol.
2-Propyn-1-ol	107-19-7	2-Propyn-1-ol.
Pyrene	129-00-0	Pyrene.
Pyridine	110-86-1	Pyridine.
Pyridine, 2-methyl-	109-06-8	2-Picoline.
Pyridine, 1-nitroso-	930-55-2	N-Nitrosopyrrolidine.
Selenium	7782-49-2	Selenium (total).
Silver	7440-22-4	Silver (total).
Sodium	7440-23-5	Sodium (total).
Sulfide	18496-25-8	Sulfide.
Sulfurous acid, 2-chloroethyl 2-[4-(1,1-dimethylethyl) phenoxy)-1-methylethyl ester.	140-57-8	Aramite.
Thallium	7440-28-0	Thallium (total).
Thiodiphosphoric acid ([HO)$_2$ P(S)]$_2$O), tetraethyl ester	3689-24-5	Tetraethyldithiopyro-phosphate.
Tin	7440-31-5	Tin (total).
Toxaphene	8001-35-2	Toxaphene.
Vanadium	7440-62-2	Vanadium (total).
Zinc	7440-66-6	Zinc (total).

APPENDIX III.—CARCINOGENIC SLOPE FACTORS (CSF's) AND REFERENCE DOSES (RfD's) FOR SELECTED HAZARDOUS CONSTITUENTS

CAS No.	Class	Chemical name	Health based levels for: Systemic toxicants—RFD (mg/kg/day)	Health based levels for: Carcinogens—CSF (mg/kg/day)
67-64-1		Acetone	1.0×10^{-1}	
75-05-8		Acetonitrile	6.0×10^{-3}	
98-86-2		Acetophenone	1.0×10^{-1}	
107-13-1	(B1)	Acrylonitrile		5.4×10^{-1}
309-00-2	(B2)	Aldrin	3.0×10^{-5}	17
62-53-3	(C)	Aniline		2.6×10^{-3}
7440-36-0		Antimony	4.0×10^{-4}	
7440-39-3		Barium *	5.0×10^{-2}	
71-43-2	(A)	Benzene *		2.9×10^{-2}
7440-41-7		Beryllium	5.0×10^{-3}	
111-44-4	(B2)	Bis(chloroethyl)ether		1.1
117-81-7	(B2)	Bis(2-ethylhexyl)phthalate	2.0×10^{-2}	8.4×10^{-3}
75-27-4		Bromodichloromethane	2.0×10^{-2}	
75-25-2		Bromoform	2.0×10^{-2}	
74-83-9		Bromomethane	4.0×10^{-4}	
75-15-0		Carbon disulfide	1.0×10^{-1}	
56-23-5	(B2)	Carbon tetrachloride *	7.0×10^{-4}	1.3×10^{-1}
57-74-9	(B2)	Chlordane	5.0×10^{-5}	1.3
108-90-7		Chlorobenzene	3.0×10^{-2}	
67-66-3	(B2)	Chloroform	1.0×10^{-2}	6.1×10^{-3}
16065-83-1		Chromium (III) *	1	
7440-47-3		Chromium (VI) *	5.0×10^{-3}	
108-39-4		Cresol, meta	5.0×10^{-2}	
95-48-7		Cresol, ortho	5.0×10^{-2}	
106-44-5		Cresol, para	5.0×10^{-2}	
57-12-5		Cyanide	2.0×10^{-2}	
72-55-9	(B2)	DDE		3.4×10^{-1}
72-54-8	(B2)	DDD		2.4×10^{-1}
50-29-3	(B2)	DDT	5.0×10^{-4}	3.4×10^{-1}
124-448-1		Dibromochloromethane	2.0×10^{-2}	
84-74-2		Dibutyl phthalate	1.0×10^{-1}	
924-16-3	(B2)	Dibutyuinitrosamine (N-Nitrosodi-n-butylamine)		5.4
75-71-8		Dichlorodifluoromethane	2.0×10^{-1}	
107-06-2	(B2)	1,2-Dichloroethane *		9.1×10^{-2}
75-35-4	(C)	1,1-Dichloroethylene *	9.0×10^{-3}	0.6
120-83-2		2,4-Dichlorophenol	3.0×10^{-3}	
60-57-1	(B2)	Dieldrin	5.0×10^{-5}	16
84-66-2		Diethyl phthalate	8.0×10^{-1}	
55-18-5	(B2)	Diethylnitrosamine (N-Nitrosodiethylamine)		150
60-51-5		Demethoate	2.0×10^{-4}	
62-75-9	(B2)	Dimethylnitrosamine (N-Nitrosodimethylamine)		51
51-28-5		2,4 Dinitrophenol	2.0×10^{-3}	
88-85-7		Dinoseb	1.0×10^{-3}	
122-39-4		Diphenylamine	3.0×10^{-2}	
298-04-4		Disulfotan	4.0×10^{-5}	
100-41-4		Ethylbenzene	1.0×10^{-1}	
76-44-8	(B2)	Heptachlor	5.0×10^{-4}	4.5
1024-57-3	(B2)	Heptachlor epoxide		9.1
87-68-3	(C)	Hexachlorobutadiene	2.0×10^{-3}	7.8×10^{-2}
319-84-6	(B2)	Hexachlorocyclohexane—alpha (alpha—BHC)		6.3
319-85-7	(C)	Hexachlorocyclohexane—beta (beta—BHC)		1.8
58-89-9	(C)	Hexachlorocyclohexane—gamma (Lindane) *	3.0×10^{-4}	1.3
77-47-4		Hexachlorocyclopentadiene	7.0×10^{-3}	
67-72-1	(C)	Hexachloroethane	1.0×10^{-3}	1.4×10^{-2}
78-83-1		Isobutyl alcohol	3.0×10^{-1}	
78-59-1		Isophorone	2.0×10^{-1}	
126-98-7		Methacrylonitrile	1.0×10^{-4}	
78-93-3		Methyl ethyl ketone	5.0×10^{-2}	
108-10-1		Methyl isobutyl ketone	5.0×10^{-2}	
298-00-0		Methyl parathion	3.0×10^{-4}	
75-09-2	(B2)	Methylene chloride	6.0×10^{-2}	7.5×10^{-3}
10595-95-6	(B2)	N-Nitroso-N-methylethylamine		22
621-64-7	(B2)	N-Nitrosodi-N-propylamine		7.0
86-30-6	(B2)	N-Nitrosodiphenylamine		4.9×10^{-3}
930-55-2	(B2)	N-Nitrosopyrrolidine		2.1
7440-02-0		Nickel	2.0×10^{-2}	
98-95-3		Nitrobenzene	5.0×10^{-4}	
56-38-2		Parathion	3.3×10^{-4}	
608-93-5		Pentachlorobenzene	8.0×10^{-4}	
82-68-8		Pentachloronitrobenzene	3.0×10^{-3}	
87-86-5		Pentachlorophenol	3.0×10^{-2}	
108-95-2		Phenol	4.0×10^{-2}	
1336-36-2	(B2)	Polychlorinated biphenyls		7.7
23950-58-5		Pronamide	8.0×10^{-2}	
110-86-1		Pyridine	1.0×10^{-3}	
7440-22-4		Silver *	3.0×10^{-3}	
100-42-5	(B2)	Styrene	2.0×10^{-1}	3.0×10^{-2}

APPENDIX III.—CARCINOGENIC SLOPE FACTORS (CSF's) AND REFERENCE DOSES (RfD's) FOR SELECTED HAZARDOUS CONSTITUENTS—Continued

CAS No.	Class	Chemical name	Health based levels for: Systemic toxicants—RFD (mg/kg/day)	Health based levels for: Carcinogens—CSF (mg/kg/day)
95-94-3		1,2,4,5-Tetrachlorobenzene	3.0×10^{-4}	
79-34-5	(C)	1,1,2,2-Tetrachloroethane		0.2
127-18-4	(C)	Tetrachloroethylene	1.0×10^{-2} [b]	5.1×10^{-2}
58-90-2		2,3,4,6-Tetrachlorophenol	3.0×10^{-2}	
108-88-3		Toluene	3.0×10^{-1}	
8001-35-2	(B2)	Toxaphene [a]		1.1
120-82-1		1,2,4-Trichlorobenzene	2.0×10^{-2}	
71-55-6		1,1,1-Trichloroethane [a]	9.0×10^{-2}	
79-00-5	(C)	1,1,2-Trichloroethane	2.0×10^{-2} [b]	5.7×10^{-2}
79-01-6	(B2)	Trichloroethylene [a]		1.1×10^{-2}
75-69-4		Trichloromonofluoromethane	3.0×10^{-1}	
95-95-4		2,4,5-Trichlorophenol	1.0×10^{-1}	
88-06-2	(B2)	2,4,6-Trichlorophenol		0.02
96-18-4		1,2,3-Trichloropropane	1.0×10^{-2}	
1330-20-7		Xylenes	2	

[a] MCL's are available for these constituents (see Table 2). MCL's should be used as trigger levels.

[b] Constituent is considered a carcinogen by the oral route. RfD is based on non-carcinogenic effects only. Trigger levels should be based on the lower of the two levels (unless an MCL exists).

How to calculate trigger levels from RfDs and RSDs:

I. Systemic Toxicants:

To calculate a trigger level based on a reference dose (RfD), multiply the RfD by the average adult body weight (70 kg) over the average water intake (2 liters of water per day).

Example for acetonitrite:

RfD = 6.0×10^{-3} mg/kg/day

$$\frac{6.0 \times 10^{-3}\ \text{mg}}{\text{kg-day}} \times \frac{70\ \text{kg}}{2\text{L/day}} = 0.2\ \text{mg/L}$$

II. Carcinogens:

To calculate a trigger level based on a carcinogenic slope factor (CSF), derive a risk-specific dose (RSD), then multiply the RSD by the average adult body weight (70 kg) over the average water intake (2 liters of water per day).

example of aldrin:

A. Aldrin is classified as a Group B2 carcinogen; it has a CSF of 17 $(\text{mg/kg/day})^{-1}$. Using a 10^{-6} risk level, the RSD is:

$$\frac{1 \times 10^{-6}}{17\ (\text{mg/kg/day})^{-1}} = 5.9 \times 10^{-8}\ \text{mg/kg/day}$$

The trigger level is:

$$\frac{5.9 \times 10^{-8}\ \text{mg}}{\text{kg-day}} \times \frac{70\ \text{kg}}{2\text{L/day}} = 2.1 \times 10^{-6}\ \text{mg/L}$$

B. Using a 10^{-4} risk level, the RSD is:

$$\frac{1 \times 10^{-4}}{17\ (\text{mg/kg/day})^{-1}} = 5.9 \times 10^{-6}\ \text{mg/kg/day}$$

The trigger level is:

$$\frac{5.9 \times 10^{-6}\ \text{mg}}{\text{kg-day}} \times \frac{70\ \text{kg}}{2\text{L/day}} = 2.1 \times 10^{-4}\ \text{mg/L}$$

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Tuesday
August 30, 1988

Part IV

Department of Education

34 CFR Part 30
Debt Collection; Final Rule

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DEPARTMENT OF EDUCATION

34 CFR Part 30

Debt Collection

AGENCY: Department of Education.

ACTION: Final rule.

SUMMARY: The Secretary of Education (Secretary) amends Part 30 of Title 34 of the Code of Federal Regulations. The amendments implement revisions to the Federal Claims Collection Standards (FCCS), which require each Federal agency to issue its own debt collection regulations, adapted to the agency's particular requirements, implementing those aspects of the FCCS that require further regulation. The regulations are intended to strengthen the ability of the Secretary to collect outstanding debts.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: James A. Nielson, U.S. Department of Education, Office of Management, 400 Maryland Avenue, SW., Room 3017 FOB-6, Washington, DC 20202. (202) 732-4149.

SUPPLEMENTARY INFORMATION: The Federal Claims Collection Standards (FCCS) (4 CFR Parts 101-105) were revised on March 9, 1984 (49 FR 8889), to reflect changes made by the Debt Collection Act of 1982 to the Federal Claims Collection Act of 1966. The FCCS, published jointly by the Department of Justice and the General Accounting Office, require agencies to publish implementing regulations.

The Secretary has already published various rulemaking documents to implement some of the revised FCCS requirements, including—

1. Proposed regulations regarding the charging of interest, published in the **Federal Register** on July 11, 1984 (49 FR 28264). (That NPRM proposed to amend various regulations, including the Education Department General Administrative Regulations. However, the Department now plans to publish those regulations in Subpart D of Part 30);

2. Final regulations regarding referral of debts to the Internal Revenue Service (IRS) for offset against tax refunds, published in the **Federal Register** on July 1, 1986 (51 FR 24095) (34 CFR 30.33);

3. Final regulations providing for: (a) offset of debts owed under programs and activities of the Department or referred to the Department by other Federal agencies; and (b) referral of debts to other Federal agencies for offset, published in the **Federal Register** on October 7, 1986 (51 FR 35645) (34 CFR Part 30, Subpart C); and

4. Final regulations regarding the reporting of debts to Consumer Reporting Agencies, published in the **Federal Register** on October 7, 1986 (51 FR 35645) (34 CFR 30.35).

The Department has also published final regulations in Parts 31 and 32 that provide salary offset procedures. The Department recently published an NPRM proposing to revise some of the procedures under Part 31 (see 53 FR 15336, April 28, 1988). The current offset procedures in Part 31 are used to recover debts owed under the Department's financial assistance programs by employees of all Federal agencies. The offset procedures in Part 32 are used to collect debts, other than those covered by Part 31 or 30, that are owed by the Department's current and former employees.

This rulemaking document establishes regulations on debt collection matters not covered by the other rulemaking documents. This rulemaking action, together with most of the other debt collection rules of the Department, will complete a unified set of debt collection regulations in 34 CFR Part 30.

Unless otherwise provided in these rules, the Secretary adopts the standards and procedures in the FCCS. Thus, these regulations supplement the FCCS in those instances where the FCCS requires agency-specific rules or the nature of a particular debt collection activity administered by the Department calls for further clarification of the FCCS. In some cases, these regulations clarify the relationship between the laws administered by the Secretary and the requirements of the FCCS.

The citations of legal authority appearing after the various sections of these regulations include references to 31 U.S.C. 3711(e), 20 U.S.C. 1221e-3(a)(1), and the Secretary's general debt collection authority under 20 U.S.C. 1226a-1. Various other statutory provisions contain authority for the promulgation of these rules with respect to particular programs administered by the Secretary. See, e.g., 20 U.S.C. 1082(a) (Guaranteed Student Loan Program). These supplemental authorities have been omitted from the citations of legal authority contained in these rules for the sake of brevity. This omission is not intended to limit in any way the programs or activities under which the Secretary is authorized to engage in debt collection under these or other procedures. Further, the Secretary reserves the right to rely on these other authorities to support these regulations.

In response to the NPRM, the Secretary received two telephone inquiries and no written comments. Therefore, the Secretary publishes these final regulations without any changes from the NPRM other than a technical change to § 30.1(c)(3) removing a cross reference to Subpart D to reflect that fact that the Department has not yet published a Subpart D to Part 30. Also, as promised in the preamble to the NPRM for this rulemaking action, a technical amendment is made to the introduction section to Subpart C, "What Provisions Apply to Administrative Offset?" Without the revision, certain provisions in that section would duplicate portions of § 30.2 "On what authority does the Secretary rely to collect a debt under this Part?"

The rationale supporting these provisions is explained in detail in the preamble to the proposed regulations, at 53 FR 5136-5138. That rationale is adopted here by reference.

Part E of the General Education Provisions Act was revised by Public Law 100-297. Under the revised Part, the Secretary will have authority to compromise debts in which the amount to be repaid is within $200,000 of the disputed amount. Because P.L. 100-297 became law after the publication of the NPRM for this rulemaking action, regulations to implement the new authority have not yet been developed. The Secretary intends to publish a rulemaking document to implement the new authority in the near future.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major regulations because they do not meet the criteria for major regulations established in that Order.

Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Assessment of Education Impact

In the notice of proposal rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rule and on its own review, the

Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 30

Claims, Debt collection.

(Catalog of Federal Domestic Assistance Number does not apply)

Dated: July 20, 1988.

William J. Bennett,

Secretary of Education.

The Secretary amends Part 30 of Title 34 of the Code of Federal Regulations, as follows:

1. The table of contents is amended by adding Subparts A, E, and F, and revising the authority citation, to read as follows:

PART 30—DEBT COLLECTION

Subpart A—General

Sec.
30.1 What administrative actions may the Secretary take to collect a debt?
30.2 On what authority does the Secretary rely to collect a debt under this Part?

* * * * *

Subpart E—What Costs and Penalties Does the Secretary Impose on Delinquent Debtors?

30.60 What costs does the Secretary impose on delinquent debtors?
30.61 What penalties does the Secretary impose on delinquent debtors?
30.62 When does the Secretary forego interest, administrative costs, or penalties?

Subpart F—What Requirements Apply to the Compromise of a Debt or the Suspension or Termination of Collection Action?

30.70 How does the Secretary exercise discretion to compromise a debt or to suspend or terminate collection of a debt?

Authority: 20 U.S.C. 1221e-3(a)(1), and 1226a-1, 31 U.S.C. 3711(e), 31 U.S.C. 3716(b) and 3720A, unless otherwise noted.

2. New Subpart A is added, to read as follows:

Subpart A—General

§ 30.1 What administrative actions may the Secretary take to collect a debt?

(a) The Secretary may take one or more of the following actions to collect a debt owed to the United States:

(1) Collect the debt under the procedures authorized in the regulations in this part.

(2) Refer the debt to the General Accounting Office for collection.

(3) Refer the debt to the Department of Justice for compromise, collection, or litigation.

(4) Take any other action authorized by law.

(b) In taking any of the actions listed in paragraph (a) of this section, the Secretary complies with the requirements of the Federal Claims Collection Standards (FCCS) at 4 CFR Parts 101-105 that are not inconsistent with the requirements of this part.

(c) The Secretary may—

(1) Collect the debt under the offset procedures in Subpart C of this part;

(2) Report a debt to a consumer reporting agency under the procedures in Subpart C of this part;

(3) Charge interest on the debt as provided in the FCCS;

(4) Impose upon a debtor a charge based on the costs of collection as determined under Subpart E of this part;

(5) Impose upon a debtor a penalty for failure to pay a debt when due under Subpart E of this part;

(6) Compromise a debt, or suspend or terminate collection of a debt, under Subpart F of this part;

(7) Take any other actions under the procedures of the FCCS in order to protect the United States Government's interests; or

(8) Use any combination of the procedures listed in this paragraph (c) as may be appropriate in a particular case.

Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3711(e).

§ 30.2 On what authority does the Secretary rely to collect a debt under this part?

(a)(1) The Secretary takes an action referred to under § 30.1(a) in accordance with—

(i) 31 U.S.C. Chapter 37, Subchapters I and II;

(ii) Other applicable statutory authority; or

(iii) The common law.

(2) If collection of a debt in a particular case is not authorized under one of the authorities described in paragraph (a)(1) of this section, the Secretary may collect the debt under any other available authority under which collection is authorized.

(b) The Secretary does not use a procedure listed in § 30.1(c) to collect a debt, or a certain type of debt, if—

(1) The procedure is specifically prohibited under a Federal statute; or

(2) A separate procedure other than the procedure described under § 30.1(c) is specifically required under—

(i) A contract, grant, or other agreement;

(ii) A statute other than 31 U.S.C. 3716; or

(iii) Other regulations.

Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3711(e)

* * * * *

2. Section 30.20 is amended by revising paragraph (a)(1), removing paragraph (b), and redesignating paragraphs (c), (d), and (e) as paragraph (b), (c), and (d), respectively, to read as follows:

§ 30.20 To what do §§ 30.20-30.31 apply?

(a)(1)(i) Sections 30.20-30.31 establish the general procedures used by the Secretary to collect debts by administrative offset.

(ii) The Secretary uses the procedures established under other regulations, including § 30.33, What procedures does the Secretary follow for IRS tax refund offsets?, 34 CFR Part 31, Salary Offset for Federal Employees Who Are Indebted to the United States Under Programs Administrated by the Secretary of Education, and 34 CFR Part 32, Salary Offset to Recover Overpayments of Pay or Allowances from Department of Education Employees, if the conditions requiring application of those special procedures exists.

3. New Subparts E and F are added, to read as follows:

* * * * *

Subpart E—What Costs and Penalties Does the Secretary Impose on Delinquent Debtors?

§ 30.60 What costs does the Secretary impose on delinquent debtors?

(a) The Secretary may charge a debtor for the costs associated with the collection of a particular debt. These costs include, but are not limited to—

(1) Salaries of employees performing Federal loan servicing and debt collection activities;

(2) Telephone and mailing costs;

(3) Costs for reporting debts to credit bureaus;

(4) Costs for purchase of credit bureau reports;

(5) Costs associated with computer operations and other costs associated with the maintenance of records;

(6) Bank charges;

(7) Collection agency costs;

(8) Court costs and attorney fees; and

(9) Costs charged by other Governmental agencies.

(b) Notwithstanding any provision of State law, if the Secretary uses a collection agency to collect a debt on a contingent fee basis, the Secretary charges the debtor, and collects through the agency, an amount sufficient to recover—

(1) The entire amount of the debt; and

(2) The amount that the Secretary is required to pay the agency for its collection services.

(c)(1) The amount recovered under paragraph (b) of this section is the entire amount of the debt, multiplied by the following fraction:

$$\frac{1}{1-cr.}$$

(2) In paragraph (c)(1) of this section, cr equals the commission rate the Department pays to the collection agency.

(d) If the Secretary uses more than one collection agency to collect similar debts, the commission rate (cr) described in paragraph (c)(2) of this section is calculated as a weighted average of the commission rates charged by all collection agencies collecting similar debts, computed for each fiscal year based on the formula

$$\sum_{i=1}^{N}\left(\frac{Xi\cdot Yi}{Z}\right)$$

where—

(1) Xi equals the dollar amount of similar debts placed by the Department with an individual collection agency as of the end of the preceding fiscal year;

(2) Yi equals the commission rate the Department pays to that collection agency for the collection of the similar debts;

(3) Z equals the dollar amount of similar debts placed by the Department with all collection agencies as of the end of the preceding fiscal year; and

(4) N equals the number of collection agencies with which the Secretary has placed similar debts as of the end of the preceding fiscal year.

(e) If a debtor has agreed under a repayment or settlement agreement with the Secretary to pay costs associated with the collection of a debt at a specified amount or rate, the Secretary collects those costs in accordance with the agreement.

(f) The Secretary does not impose collection costs against State or local governments under paragraphs (a) through (d) of this section.

Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3711(e), 3717(e)(1), 3718).

§ 30.61 What penalties does the Secretary impose on delinquent debtors?

(a) If a debtor does not make a payment on a debt, or portion of a debt, within 90 days after the date specified in the first demand for payment sent to the debtor, the Secretary imposes a penalty on the debtor.

(b)(1) The amount of the penalty imposed under paragraph (a) of this section is 6 percent per year of the amount of the delinquent debt.

(2) The penalty imposed under this section runs from the date specified in the first demand for payment to the date the debt (including the penalty) is paid.

(c) If a debtor has agreed under a repayment or settlement agreement with the Secretary to pay a penalty for failure to pay a debt when due, or has such an agreement under a grant or contract under which the debt arose, the Secretary collects the penalty in accordance with the agreement, grant, or contract.

(d) The Secretary does not impose a penalty against State or local governments under paragraphs (a) and (b) of this section.

Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3711(e).

§ 30.62 When does the Secretary forego interest, administrative costs, or penalties?

(a) For a debt of any amount based on a loan, the Secretary may refrain from collecting interest or charging administrative costs or penalties to the extent that compromise of these amounts is appropriate under the standards for compromise of a debt contained in 4 CFR Part 103.

(b) For a debt not based on a loan the Secretary may waive, or partially waive, the charging of interest, or the collection of administrative costs or penalties, if—

(1) Compromise of these amounts is appropriate under the standards for compromise of a debt contained in 4 CFR Part 103; or

(2) The Secretary determines that the charging of interest or the collection of administrative costs or penalties is—

(i) Against equity and good conscience; or

(ii) Not in the best interests of the United States.

(c) The Secretary may exercise waiver under paragraph (b)(1) of this section without regard to the amount of the debt.

(d) The Secretary may exercise waiver under paragraph (b)(2) of this section if—

(1) The Secretary has accepted an installment plan under 4 CFR 102.11;

(2) There is no indication of fault or lack of good faith on the part of the debtor; and

(3) The amount of interest, administrative costs, and penalties is such a large portion of the installments that the debt may never be repaid if that amount is collected.

(e)(1) The Secretary does not charge interest on any portion of a debt, other than a loan, owed by a person subject to 31 U.S.C. 3717 if the debt is paid within 30 days after the date of the first demand for payment.

(2) The Secretary may extend the period under paragraph (e)(1) of this section if the Secretary determines that the extension is appropriate.

Authority: 20 U.S.C. 1221e–3(a)(1) and 1226a–1, 31 U.S.C. 3711(e).

Subpart F—What Requirements Apply to the Compromise of a Debt or the Suspension or Termination of Collection Action?

§ 30.70 How does the Secretary exercise discretion to compromise a debt or to suspend or terminate collection of a debt?

(a) The Secretary uses the standards in the FCCS, 4 CFR Part 103, to determine whether compromise of a debt is appropriate if—

(1) The debt must be referred to the Department of Justice under this section; or

(2) The amount of the debt is less than or equal to $20,000 and the Secretary does not follow the procedures in paragraph (e) of this section.

(b) The Secretary refers a debt to the Department of Justice to decide whether to compromise a debt if—

(1) The debt was incurred under a program or activity subject to section 452(f) of the General Education Provisions Act and the initial determination of the debt was more than $50,000; or

(2) The debt was incurred under a program or activity not subject to section 452(f) of the General Education Provisions Act and the amount of the debt is more than $20,000.

(c) The Secretary may compromise the debt under the procedures in paragraph (e) of this section if—

(1) The debt was incurred under a program or activity subject to section 452(f) of the General Education Provisions Act; and

(2) The initial determination of the debt was less than or equal to $50,000.

(d) The Secretary may compromise a debt without following the procedure in paragraph (e) of this section if the amount of the debt is less than or equal to $20,000.

(e) The Secretary may compromise the debt pursuant to paragraph (c) of this section if—

(1) The Secretary determines that—

(i) Collection of any or all of the debt would not be practical or in the public interest; and

(ii) The practice that resulted in the debt has been corrected and will not recur;

(2) At least 45 days before compromising the debt, the Secretary publishes a notice in the **Federal Register** stating—

(i) The Secretary's intent to compromise the debt; and

(ii) That interested persons may comment on the proposed compromise; and

(3) The Secretary considers any comments received in response to the **Federal Register** notice before finally compromising the debt.

(f)(1) The Secretary uses the standards in the FCCS, 4 CFR Part 104, to determine whether suspension or termination of collection action is appropriate.

(2) The Secretary—

(i) Refers the debt to the Department of Justice to decide whether to suspend or terminate collection action if the amount of the debt at the time of the referral is more than $20,000; or

(ii) May decide to suspend or terminate collection action if the amount of the debt at the time of the Secretary's decision is less than or equal to $20,000.

(g) In determining the amount of a debt under paragraphs (a) through (f) of this section, the Secretary excludes interest, penalties, and administrative costs.

(h) Notwithstanding paragraphs (b) through (f) of this section, the Secretary may compromise a debt, or suspend or terminate collection of a debt, in any amount if the debt arises under the Guaranteed Student Loan Program authorized under Title IV, Part B, of the Higher Education Act of 1965, as amended, or the Perkins Loan Program authorized under Title IV, Part E, of the Higher Education Act of 1965, as amended.

(i) The Secretary refers a debt to the General Accounting Office (GAO) for review and approval before referring the debt to the Department of Justice for litigation if—

(1) The debt arose from an audit exception taken by GAO to a payment made by the Department; and

(2) The GAO has not granted an exception from the GAO referral requirement.

(j) Nothing in this section precludes—

(1) A contracting officer from exercising his authority under applicable statutes, regulations, or common law to settle disputed claims relating to a contract; or

(2) The Secretary from redetermining a claim.

Authority: 20 U.S.C. 1082(a) (5) and (6), 1087hh, 1221e-3(a)(1), 1226a-1, and 1234a(f), 31 U.S.C. 3711(e).

[FR Doc. 88-19677 Filed 8-29-88; 8:45 am]

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federal register

Tuesday
August 30, 1988

Part V

Department of Education

34 CFR Part 668

Student Assistance General Provisions; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 668

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends Subpart B of the Student Assistance General Provisions regulations. These amendments make technical corrections, simplify procedures, and reduce administrative burden while not diminishing existing controls over fraud, waste, and abuse in the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA programs).

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Jeffrey R. Andrade, U.S. Department of Education, 400 Maryland Ave., SW. (Regional Office Building 3, Room 4318), Washington, DC 20202. Telephone (202) 732-4888.

SUPPLEMENTARY INFORMATION: The Student Assistance General Provisions regulations implement requirements that are common to the participation of the postsecondary institutions in the Title IV, HEA programs. The Title IV, HEA programs include the Pell Grant, Guaranteed Student Loan (GSL), PLUS, Supplemental Loans for Students (SLS) (formerly ALAS), Consolidation Loan, State Student Incentive Grant (SSIG), Robert C. Byrd Honors Scholarship (Byrd Scholarship), Income Contingent Loan (ICL), Perkins Loan (formerly National Direct Student Loan (NDSL)), College Work-Study, and Supplemental Educational Opportunity Grant (SEOG) programs. The last three programs are known collectively as "the campus-based programs." Public Law 100-297 has renamed the Guaranteed Student Loan (GSL) Program, the Stafford Loan Program. This change will be reflected in a later document.

On December 1, 1987, the Secretary published final regulations for the Student Assistance General Provisions in the **Federal Register** (52 FR 45712). Section 668.19 of the regulations requires an institution to provide to another institution upon request, information on the financial aid transcript that relates to the eligibility requirements contained in section 484(a)(3) of the Higher Education Act of 1965, as amended. That section provides that in order for a student to receive financial assistance under any Title IV, HEA program at any institution, the student may not be in default on any Title IV, HEA loan and must not owe a refund on a Title IV, HEA grant received for attendance at any institution.

Under § 668.19(b), an institution must provide to another institution information in its possession regarding whether the student for which the information was requested attended another eligible institution. In addition, § 668.19(c) (4), (6), (8), (11), and (13) require the institution providing the transcript to provide to the requesting institution specific information it has in its possession on whether the student is in default on a Title IV, HEA loan or owes a refund on a Title IV, HEA grant received for attendance at another institution and the loan amounts at another institution.

The information requirements of § 668.19(c) (4), (6), (8), (11), and (13) were designed to cross-check information provided to an institution by another institution. However, the Secretary believes that the administrative burden imposed by these requirements outweighs the benefits, and in many cases, the data provided may be dated, not reflective of the student's current situation, and thus of questionable value. Therefore, the Secretary is deleting the requirements of § 668.19(c) (4), (6), (8), (11), and (13) because they may constitute an unnecessary administrative burden on many institutions providing transcripts.

An institution requesting a transcript is still required under § 668.19(a)(3) to receive a financial aid transcript from each eligible institution the student previously attended, and an institution providing a financial aid transcript under § 668.19(b) is still required to provide information on whether the student attended another eligible institution. Therefore the Secretary believes that adequate safeguards to protect against fraud, waste, and abuse are maintained.

The Secretary is also making a technical correction to § 668.19(c)(9) to correspond to the definition of Perkins Loan found in § 668.2. These regulations clarify that the institution providing the transcript must inform the requesting institution whether the student owed an outstanding balance on a Defense loan or Direct loan on July 1, 1987.

Waiver of Notice of Proposed Rulemaking

In accordance with section 431(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1232(b)(2)(A)), and the Administrative Procedure Act, 5 U.S.C. 553, it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. However, the Secretary has received numerous letters from the postsecondary educational community concerning the implementation of the financial aid transcript requirements in the regulations which became effective on July 1, 1988. The Secretary has determined that some of the financial aid transcript requirements which were published in the December 1, 1987 regulations are not needed to meet adequately the statutory provisions contained in the Consolidated Omnibus Budget Reconciliation Act of 1985, are duplicative and an administrative burden on institutions, may seriously delay the timely delivery of student aid to needy students, and may leave institutions open to potential liabilities for providing outdated and inaccurate information which subsequently may lead to the denial of Federal student financial assistance to an otherwise qualified student. The changes made in this document remove these requirements. Therefore, pursuant to 5 U.S.C. 553(b)(B), the Secretary finds that publication of proposed regulations as to these changes is unnecessary, impracticable, and contrary to the public interest.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in that order.

Assessment of Education Impact

The Secretary has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Education Grant Programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student aid.

(Catalog of Federal Domestic Assistance Numbers: Supplemental Educational Opportunity Grant Program, 84.007; Guaranteed Student Loan Program, 84.032;

PLUS Program, 84.032; College Work-Study Program, 84.033; Perkins Loan Program, 84.038; Income Contingent Loan Program, 84.038; Pell Grant Program, 84.063; State Student Incentive Grant Program, 84.069)

Dated: August 3, 1988.

William J. Bennett,
Secretary of Education.

The Secretary amends Part 668 of Title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for Part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, and 1141, unless otherwise noted.

2. Section 668.19 is amended by revising paragraph (c) and adding an OMB Control Number to read as follows:

§ 668.19 Financial aid transcript.

* * * * *

(c) A financial aid transcript must be signed by an official authorized by the institution providing the transcript to disclose information in connection with Title IV, HEA programs and must include, for any award year for which that institution has or is required to keep records—

(1) The student's name and social security number;

(2) Whether the student was treated as an independent student under any Title IV, HEA program in the award year preceding the award year for which a financial aid transcript is requested;

(3) Whether the student is in default on any loan made under the ICL, National Defense/Direct Student Loan, or Perkins Loan programs for attendance at the institution;

(4) To the extent that the institution is aware, whether the student is in default on any loan made under the GSL, PLUS, or SLS programs for attendance at the institution or any loan made under the Consolidation Loan Program;

(5) Whether the student owes a refund on any grant made under the Pell Grant or SEOG programs and, to the extent that the institution is aware, the SSIG Program, for attendance at the institution;

(6) For the award year for which a financial aid transcript is requested, the student's Scheduled Pell Grant and the amount of Pell Grant funds disbursed to the student;

(7) The total amount of loans made under the ICL Program to the student for attendance at the institution;

(8) The total amount of loans made under the National Defense/Direct Student Loan and Perkins Loan programs to the student for attendance at the institution;

(9) Whether the student owed an outstanding balance on July 1, 1987 on either a Defense loan or Direct loan made for attendance at the institution;

(10) The amount of and period covered by each loan made to the student under the GSL, PLUS, or SLS programs for attendance at the institution; and

(11) The amount of and period covered by each loan made under the PLUS Program on behalf of the student for attendance at the institution.

Authority: 20 U.S.C. 1094

(Approved by the Office of Management and Budget under control number 1840-0537)

[FR Doc. 88-19678 Filed 8-29-88; 8:45 am]

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 523–6641. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone 202–275–3030).

H.R. 2213 / Pub. L. 100–394

Hearing Aid Compatibility Act of 1988. (Aug. 16, 1988; 102 Stat. 976; 3 pages) Price: $1.00

H.R. 2629 / Pub. L. 100–395

To amend the Alaska National Interest Lands Conservation Act of 1980 to clarify the conveyance and ownership of submerged lands by Alaska Natives, Native Corporations and the State of Alaska. (Aug. 16, 1988; 102 Stat. 979; 3 pages) Price: $1.00

S.J. Res. 294 / Pub. L. 100–396

Designating August 9, 1988, as "National Neighborhood Crime Watch Day". (Aug. 16, 1988; 102 Stat. 982; 1 page) Price: $1.00

S.J. Res. 350 / Pub. L. 100–397

Designating Labor Day Weekend, September 3–5, 1988, as "National Drive for Life Weekend." (Aug. 16, 1988; 102 Stat. 983; 2 pages) Price: $1.00

H.R. 3932 / Pub. L. 100–398

Presidential Transitions Effectiveness Act. (Aug. 17, 1988; 102 Stat. 985; 4 pages) Price: $1.00

H.R. 3980 / Pub. L. 100–399

Agricultural Credit Technical Corrections Act of 1988. (Aug. 17, 1988; 102 Stat. 989; 21 pages) Price: $1.00

H.J. Res. 138 / Pub. L. 100–400

To authorize and request the President to issue a proclamation designating the third Sunday of August 1988 as "National Senior Citizens Day." (Aug. 17, 1988; 102 Stat. 1010; 1 page) Price: $1.00

H.J. Res. 140 / Pub. L. 100–401

Designating August 12, 1988, as "National Civil Rights Day." (Aug. 17, 1988; 102 Stat. 1011; 1 page) Price: $1.00

S. 2200 / Pub. L. 100–402

To amend Public Law 90–498 to provide for the designation of National Hispanic Heritage Month. (Aug. 17, 1988; 102 Stat. 1012; 1 page) Price: $1.00

H.R. 4676 / Pub. L. 100–403

To amend the Temporary Child Care for Handicapped Children and Crisis Nurseries Act of 1986 to extend through the fiscal year 1989 the authorities contained in such Act. (Aug. 19, 1988; 102 Stat. 1013; 1 page) Price: $1.00

H.R. 4800 / Pub. L. 100–404

Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1989. (Aug. 19, 1988; 102 Stat. 1014; 26 pages) Price: $1.00

H.J. Res. 525 / Pub. L. 100–405

To designate the month of November 1988 as '"National Hospice Month." (Aug. 19, 1988; 102 Stat. 1040; 1 page) Price: $1.00

S. 1979 / Pub. L. 100–406

To establish the Grays Harbor National Wildlife Refuge. (Aug. 19, 1988; 102 Stat. 1041; 3 pages) Price: $1.00

S. 2561 / Pub. L. 100–407

Technology-Related Assistance for Individuals With Disabilities Act of 1988. (Aug. 19, 1988; 102 Stat. 1044; 22 pages) Price: $1.00

H.R. 1414 / Pub. L. 100–408

Price-Anderson Amendments Act of 1988. (Aug. 20, 1988; 102 Stat. 1066; 20 pages) Price: $1.00

H.R. 1860 / Pub. L. 100–409

Federal Land Exchange Facilitation Act of 1988. (Aug. 20, 1988; 102 Stat. 1086; 9 pages) Price: $1.00

H.R. 3431 / Pub. L. 100–410

To release a reversionary interest of the United States in a certain parcel of land located in Bay County, Florida. (Aug. 22, 1988; 102 Stat. 1095; 2 pages) Price: $1.00

H.R. 3617 / Pub. L. 100–411

To settle certain land claims of the Coushatta Tribe of Louisiana against the United States, to authorize the use and distribution of the settlement funds, and for other purposes. (Aug. 22, 1988; 102 Stat. 1097; 3 pages) Price: $1.00

H.R. 3880 / Pub. L. 100–412

To extend the authorization of the Upper Delaware Citizens Advisory Council for an additional ten years. (Aug. 22, 1988; 102 Stat. 1100; 1 page) Price: $1.00

H.R. 4458 / Pub. L. 100–413

Parimutuel Licensing Simplification Act of 1988. (Aug. 22, 1988; 102 Stat. 1101; 1 page) Price: $1.00

H.R. 4694 / Pub. L. 100–414

To amend the Perishable Agricultural Commodities Act to increase the statutory ceilings on license fees. (Aug. 22, 1988; 102 Stat. 1102; 2 pages) Price: $1.00

H.R. 4754 / Public Law 100-415

To amend the Pennsylvania Avenue Development Corporation Act of 1972 to authorize appropriations for implementation of the development plan for Pennsylvania Avenue between the Capitol and the White House, and for other purposes (Aug. 22, 1988; 102 Stat. 1104; 1 page) Price: $1.00

H.R. 5141 / Public Law 100-416

To delay temporarily certain regulations relating to sea turtle conservation (Aug. 22, 1988; 102 Stat. 1105; 1 page) Price: $1.00

H.J. Res. 417 / Public Law 100–417

Designating May 1989 as "Neurofibromatosis Awareness Month" (Aug. 22, 1988; 102 Stat. 1106; 1 page) Price: $1.00

H.R. 4848 / Pub. L. 100–418

Omnibus Trade and Competitiveness Act of 1988. (Aug. 23, 1988; 102 Stat. 1107; 468 pages) Price: $13.00

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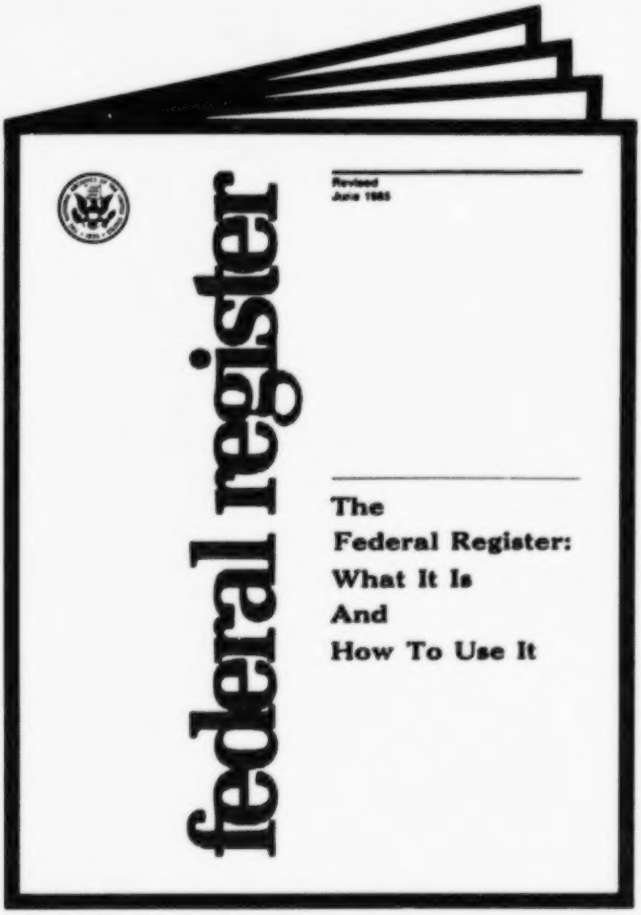

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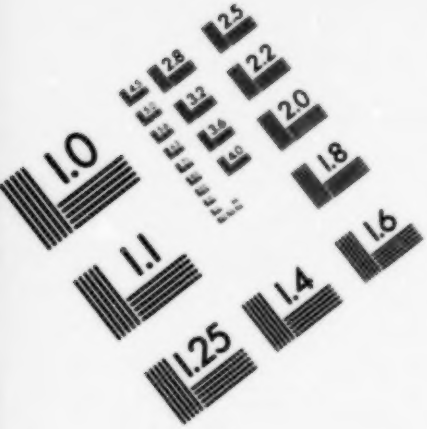
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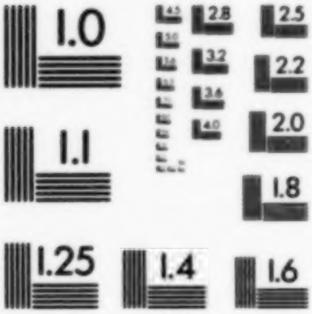
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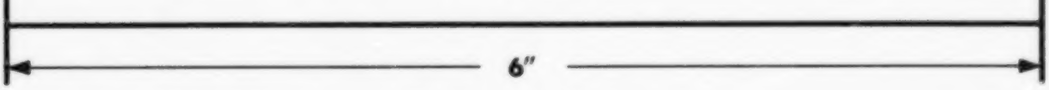

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